Supreme Court, U.S.
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No. 01-518

In The
Supreme Court of the United States

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals
For The Sixth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: September 25, 2001
Certiorari Granted: January 4, 2002

105 pp

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General Docket
US Court of Appeals for the Sixth Circuit

BE&K CONSTRUCTION COMPANY

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD;

Respondent Cross-Petitioner

STEAMFITTERS LOCAL 342, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO (US LOCAL 342); LOCAL 302 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO (IBEW LOCAL 302); DISTRICT COUNCIL OF IRONWORKERS OF THE STATE OF CALIFORNIA AND VICINITY; INTERNATIONAL UNION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, AFL-CIO

Intervenors

1/6/00	NLRB Case Docketed. Cross-Application for enforcement of an order of the NLRB filed by Respondent (m-1/6 by case manager) (ac) [00-5012]
1/6/00	CERTIFIED LIST filed. [99-6469, 00-5012] (ac) [00-5012 99-6469]
1/6/00	BRIEFING LETTER SENT setting cross appeal briefing schedule: first brief due

2/15/2000; second brief due 3/16/2000 (NLRB & ITV); fourth brief due 3/30/2000; appendix due 4/6/2000; final briefs due 4/27/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/6/00 ADMINISTRATIVE RECORD filed. Volumes included: 1 Ex; 1 Pl. [00-5012] (mrs) [00-5012]

1/21/00 AMENDED CERTIFIED LIST filed. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/16/00 FIRST PROOF BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of Service date 2/15/2000. Number of Pages: 66. [99-6469, 00-5012] _ (ac) [00-5012 99-6469]

2/16/00 Request to require oral argument filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/24/00 APPEARANCE filed by Attorney Heather L. MacDougall for Assoc Builders, LPA Inc. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/24/00 MOTION filed to allow LPA Inc & Associated Builders to become an amici curiae. Motion filed by Heather L. MacDougall for Assoc Builders, LPA Inc. Certificate of service date 2/22/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/24/00 TENDERED : amici curiae brief from Heather L. MacDougall for Assoc Builders, LPA Inc. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/2/00 Intervenor MOTION filed to extend time to 4/14 to file brief . Motion filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council, Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 2/29/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/6/00 Respondent MOTION filed to extend time to file brief. Motion filed by Aileen A. Armstrong for Respondent Cross-Petitioner NLRB. Certificate of service date 3/1/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/6/00 LETTER SENT by ac granting motions in part to extend briefing filed by Aileen A. Armstrong, Sandra R. Benson, Peter D. Nussbaum, resetting cross appeal briefing schedule: second & itv briefs now due 4/6/2000; fourth brief now due 4/20/2000; appendix now due 4/27/2000; final briefs now due 5/18/2000. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/29/00 Respondent's 2nd MOTION filed to extend time to 4/20 to file brief. Motion filed by Eileen A. Armstrong for Respondent Cross-Petitioner NLRB. Certificate of service date 3/28/00. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/30/00 LETTER SENT by ac granting motion to extend briefing filed by Aileen A. Armstrong, resetting cross appeal briefing schedule: second brief due 4/20/00; fourth brief due 5/10/00; appendix due 5/17/00; final briefs now due 6/7/00. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/6/00 Intervenor MOTION filed to take judicial notice . Motion filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 4/5/00. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 PROOF BRIEF filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Certificate of service date 4/6/00 . Number of Pages: 72. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 Request to require oral argument filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 PROOF BRIEF filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Loca. Certificate of service date 4/5/00 . Number of Pages: 71. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/7/00 Request to require oral argument filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/24/00 PROOF BRIEF filed by Anne Marie Lofaso and David Habenstreit for Respondent Cross-Petitioner NLRB. Copies: 1. Certificate of Service date 4/20/00 . Number of Pages: 65. [99-6469, 00-5012] _ (ac) [00-5012 99-6469]

4/24/00 Request to require oral argument filed by Anne Marie Lofaso and David Habenstreit for

Respondent Cross-Petitioner NLRB. [99-6469, 00-5012] (ac) [00-5012 99-6469]

5/11/00 PROOF BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date 5/10/00 . Number of Pages: 30. [99-6469, 00-5012] (ac)

5/18/00 Intervenor MOTION filed requesting leave to appear at oral argument. Motion filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 5/17/00 . [99-6469, 00-5012] (ac) [00-5012 99-6469]

5/18/00 APPENDIX filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Copies: 5. Certificate of service date 5/17/00 [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/2/00 Intervenor MOTION filed to take judicial notice. Motion filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Certificate of service date 5/30/00 . [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/5/00 FINAL BRIEF filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. Copies: 7 Certificate of service date 6/1/00 Number of Pages: 73. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/5/00 Request to require oral argument filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/5/00 APPEARANCE filed by Attorney Meera Trehan for Intervenors Local 302 Intl, Steamfitters Local. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/6/00 FINAL BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. 7. Certificate of Service date 6/5/00 . Number of Pages: 67. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/6/00 Request to require oral argument filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/6/00 FINAL BRIEF filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Copies: 7. Certificate of service date 6/5/00. Number Pages: 31. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/8/00 FINAL BRIEF filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Copies: 7 Certificate of service date 6/7/00 Number of Pages: 70. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/8/00 Request to require oral argument filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/9/00 FINAL BRIEF filed by Anne Marie Lofaso and David Habenstreit for Respondent Cross-Petitioner NLRB. Copies: 7 Certificate of service date 6/7/00 . Number of Pages: 69. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/9/00 Request to require oral argument filed by Anne Marie Lofaso and David Habenstreit for Respondent Cross-Petitioner NLRB. [99-6469, 00-5012] (ac) [00-5012 99-6469]

6/14/00 Petitioner RESPONSE in opposition filed regarding motions to take judicial notice. Response from Maurice Baskin for Petitioner Cross-Respondent BE&K Constr Certificate of service date 6/13/00 [99-6469, 00-5012] (ac) [00-5012 99-6469]

9/5/00 Intervenor MOTION filed requesting leave to appear at oral argument and allote them five additional minutes. Motion filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Certificate of service date 8/31/00 . [99-6469, 00-5012] (ac) [00-5012 99-6469]

11/29/00 Oral argument date set for February 1, 2001 in court room 403. Notice of argument sent to counsel. [99-6469, 00-5012] (rld) [00-5012 99-6469]

12/27/00 Errata to brief of intervenors UA Local 302, et al filed 6/5/00 by Peter D. Nussbaum for Intervenor Local 302 Intl, Steamfitters Local. [99-6469, 00-5012] (ac) [00-5012 99-6469]

12/27/00 ADDITIONAL CITATION filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local Certificate of service date none but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/9/01 ORDER filed granting motions to appear at oral argument filed by Sandra R. Benson and Peter D. Nussbaum. The court will allow one 5 minute extension for all intervenors to argue orally. BE&K & NLRB will also have an additional 5 minutes for a total of 20 minutes. The intervenors motions to take judicial notice will be taken under advisement pending oral argument and granting motion to file an amicus curiae brief filed by Heather L. MacDougall. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/9/01 BRIEF filed by Heather L. MacDougall for Amici Curiae Assoc Builders and LPA Inc. Copies 7. Certificate of service date 2/22/00. Number of Pages: 36. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/17/01 APPEARANCE filed by Attorney Robert J. Englehart for Respondent Cross-Petitioner NLRB. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/26/01 ADDITIONAL CITATION filed by Meera Trehan for Intervenors Local 302 Intl, Steamfitters Local. Certificate of service date 1/26/01 [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/29/01 ADDITIONAL CITATION filed by Aileen A. Armstrong for Respondent Cross-Petitioner NLRB. Certificate of service date 1/26/01 [99-6469, 00-5012] (yh) [00-5012 99-6469]

1/30/01 ADDITIONAL CITATION filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date none

but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

1/30/01 Respondent MOTION filed for reallocation of oral argument time. Motion filed by Robert J. Englehart for Respondent Cross-Petitioner NLRB. Certificate of service date 1/30/01. [99-6469, 00-5012] (ac) [00-5012 99-6469]

2/1/01 CAUSE ARGUED on 2/1/01 by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr in 99-6469/00-5012, Robert J. Englehart for Respondent Cross-Petitioner NLRB in 99-6469/00-5012, Peter D. Nussbaum for Intervenor Local 302 Intl, Intervenor Steamfitters Local in 99-6469/00-5012, Sandra R. Benson for Intervenor Intl Union of Bridge, Intervenor District Council in 99-6469/00-5012, before Judges Daughtrey, Gilman, Collier. [99-6469, 00-5012] (me) [00-5012 99-6469]

2/2/01 LETTER SENT by ac granting motion for reallocation of oral argument filed by Robert J. Englehart. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/13/01 ADDITIONAL CITATION filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date none but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

3/26/01 ADDITIONAL CITATION filed by Peter D. Nussbaum for Intervenors Local 302 Intl, Steamfitters Local Certificate of service date none but served. [99-6469, 00-5012] (ac) [00-5012 99-6469]

4/9/01	OPINION filed : DENY BE&K's petition for review of the Board decision and GRANT the Board's request for enforcement of that ruling, decision for publication pursuant to local rule 206 [99-6469, 00-5012] . Martha C. Daughtrey, Authoring Judge, Ronald L. Gilman, Circuit Judge, Curtis L. Collier, District Judge. (mcp) [00-5012 99-6469]
4/9/01	JUDGMENT : The cross-application for enforcement of the order issued by the National Labor Relations Board in this matter is GRANTED and the petition for review is DENIED. (mcp) [00-5012 99-6469]
4/13/01	BILL OF COST filed by David Habenstreit for Respondent Cross-Petitioner NLRB. Amount: $221.00. Certificate of service date 4/11/01 . [99-6469, 00-5012] (ac) [00-5012 99-6469]
4/27/01	TENDERED : bill of cost from Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. [99-6469, 00-5012] (ac) [00-5012 99-6469]
5/23/01	PETITION for en banc rehearing filed by Maurice Baskin for Petitioner Cross-Respondent BE&K Constr. Certificate of service date 5/22/01. [99-6469, 00-5012] (blh) [00-5012 99-6469]
6/28/01	ORDER filed denying petition for en banc rehearing [2361205-1] filed by Maurice Baskin [99-6469, 00-5012]. Martha C. Daughtrey, Ronald L. Gilman, Circuit Judges;

	Curtis L. Collier, District Judge. (blh) [00-5012 99-6469]
7/23/01	ADMINISTRATIVE RECORD RETURNED to lower court at the end of appellate proceedings. [99-6469, 00-5012] Volumes included: 1 PL; 1 Ex. (mrs) [00-5012 99-6469]
7/27/01	MANDATE ISSUED with costs to be recovered by Respondent Cross-Petitioner NLRB. Amount: $221.00. [99-6469, 00-5012] (ac) [00-5012 99-6469]
8/6/01	Record acknowledgment received from the district court. Acknowledged by: aa. Acknowledgment date: 08/01/01. [99-6469, 00-5012] (mrs) [00-5012 99-6469]
8/23/01	BILL OF COST filed by Sandra R. Benson for Intervenors Intl Union of Bridge, District Council. Amount: $224.25. Certificate of service date 4/24/01. [99-6469, 00-5012] (ac) [00-5012 99-6469]
8/23/01	LETTER SENT by ac: allowing Intervenors, District Council of Ironworkers, International Union of Bridge, AFL-CIO, et al to recover costs in the amount of $224.25. [2412610-1] [99-6469, 00-5012] (ac) [00-5012 99-6469]
10/1/01	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Petitioner Cross-Respondent BE&K Constr in 99-6469, Petitioner Cross-Respondent BE&K Constr in 00-5012 . Filed in the Supreme Court on 09-25-01, Supreme Ct. case number:

01-518 . [99-6469, 00-5012] (swh) [00-5012 99-6469]

2/4/02 U.S. Supreme Court letter filed granting petition for writ of certiorari limited to a single question [2432176-1] filed by BE&K Constr, BE&K Constr filed in Supreme Court January 4, 2002 [99-6469, 00-5012] in 99-6469, 00-5012. Filed in the Supreme Court on 01-04-02. (swh) [00-5012 99-6469]

USS-POSCO INDUSTRIES and BE & K CONSTRUCTION COMPANY, Plaintiffs, v. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO; PILE DRIVERS, DIVERS, CARPENTERS, BRIDGE, WHARF & DOCK BUILDERS, LOCAL 34, of the UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, AFL-CIO; OPERATING ENGINEERS LOCAL UNION NO. 3 of the INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; IRON WORKERS LOCAL 378 of the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS, AFL-CIO; DISTRICT COUNCIL OF IRON WORKERS OF THE STATE OF CALIFORNIA & VICINITY, AFL-CIO; PLASTERERS & CEMENT MASONS LOCAL 825 of the OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSOCIATION, AFL-CIO; DISTRICT COUNCIL OF PLASTERERS & CEMENT MASONS OF NORTHERN CALIFORNIA, AFL-CIO; NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, AFL-CIO; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, LOCAL NO. 549, AFL-CIO; STEAMFITTERS LOCAL UNION NO. 342 of the UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES & CANADA, AFL-CIO; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 302, AFL-CIO, Defendants

No. C-87-4829 DLJ
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

July 29, 1988, Decided
July 29, 1988, Filed

***

JUDGES: D. Lowell Jensen, United States District Judge.

OPINIONBY: JENSEN

OPINION: MEMORANDUM AND ORDER

D. LOWELL JENSEN, UNITED STATES DISTRICT JUDGE.

Defendants' motions to dismiss or for partial summary judgment came on for hearing on June 1, 1988. Defendants International Brotherhood of Electrical Workers (IBEW) Local 302 and Steamfitters Local 342 appeared through counsel Peter P. Nussbaum. Remaining defendants appeared through counsel Victor J. Van Bourg. Plaintiffs appeared though counsel Richard A. Leasia. The Court has considered the memoranda and documents submitted, as well as the oral arguments of counsel and now ORDERS as follows:

1. The defendants' motions for partial summary judgment as to the plaintiffs' first and fourth claims for relief are GRANTED;

2. The defendants' motion for summary judgment as to the plaintiffs' third claim for relief is DENIED without prejudice and may be refiled on November 9, 1988;

3. Defendants IBEW Local 302 and Steamfitters Local 342's motion for a protective order prohibiting discovery in this matter is DENIED without prejudice; and

4. Defendants' motion for sanctions is DENIED without prejudice.

I.

This lawsuit raises the issue of the scope of permissible activities through which labor unions may attempt to influence hiring and contracting decisions by employers.

Plaintiff USS-POSCO Industries (UPI) is a California general partnership formed by USX Corporation (formerly US Steel) and Pohang Iron and Steel Company, a South Korean concern. The purpose of the partnership is to modernize and operate an outdated steel facility in Pittsburg, California. Plaintiff BE&K Construction Company (BE&K) is a non-union contractor to which UPI awarded a construction contract to modernize the facility. There are 12 defendants. Seven are locals of various unions associated with the AFL-CIO, and five are associations of labor unions.

Plaintiff UPI plans a multimillion dollar modernization project for the Pittsburg facility (the Project). After plaintiff BE&K was awarded the primary contract, defendants allegedly attempted to coerce plaintiff UPI to enter into illegal "hot cargo" agreements prohibited by Section 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(e), and to force plaintiffs UPI and BE&K and other entities, by secondary boycott, to cease doing business with each other, and/or recognize the defendant labor organizations as the representatives of plaintiffs' employees, even though defendants had not been certified as representatives under 29 U.S.C.
§ 159. Plaintiffs allege that such acts constitute unfair labor practices under Sections 8(b)(4)(ii) (A) and (B) of the NLRA, 29 U.S.C. §§ 158(b)(4)(ii)(A) and (B).

Defendants allegedly effected this illegal coercion by four methods: (1) advocating the adoption and enforcement of a toxic waste ordinance in Contra Costa County which could impede the Project's progress; (2) picketing and

handbilling at plaintiffs' premises; (3) filing a lawsuit in state court alleging, among other things, violations of California's Health and Safety Code; and (4) initiating collective bargaining grievance proceedings against Eichleay Constructors, Inc. (ECI), a partner in a joint venture with plaintiff BE&K to perform the Project contract.

Defendants' motions challenge the first, third, and fourth claims. Defendants argue that the activities challenged in the first and third claims (legislative lobbying and filing lawsuits, respectively) are protected by the First Amendment. Regarding the fourth claim, initiation of grievance proceedings, defendants argue that because contractual grievance and arbitration proceedings are the preferred method of resolving labor disputes under federal labor policy, resort to those processes cannot create liability for unfair labor practices.

II.

As to legislative lobbying and the filing of lawsuits, defendants assert that these activities fall under the First Amendment right to petition, and that the *Noerr-Pennington* doctrine provides immunity for such activities. The *Noerr-Pennington* doctrine arose in the antitrust context. The doctrine basically provides antitrust immunity for certain petitioning activities, even if done for the purpose of restraining trade. Defendants argue that the rationale behind *Noerr-Pennington* should apply to the instant case, and that defendants' petitioning activities, protected under the First Amendment, are immune from liability under federal labor laws.

A. The *Noerr-Pennington* Doctrine

In Eastern Railroad Presidents Conference, et al. v. Noerr Motor Freight, Inc., et al., 365 U.S. 127, 5 L. Ed. 2d 464, 82 S. Ct. 523 (1961), the Supreme Court held that the

Sherman Act did not bar an association of railroad companies from banding together to influence legislation destructive of the trucking industry. The unanimous opinion of the Court purported only to interpret the antitrust laws. In doing so, the Court considered several factors. First, the Court reasoned that representative democracy depends on "the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Sherman Act was not intended to regulate this type of political activity, but only business activity. Second, interpreting the Sherman Act to bar the railroads' lobbying activities would "raise important constitutional questions." *Id.* at 138. The Court concluded that the railroads' activities were not prohibited under the Sherman Act.

In *United Mine Workers v. Pennington*, 381 US. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965), the Court broadened the *Noerr* holding to encompass the petitioning of other public officials besides legislators. *Pennington* also emphasized the irrelevance of the petitioner's underlying purpose. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Id.* at 670.

Despite this language, *Noerr-Pennington* does not shield all petitioning activity from antitrust liability. The *Noerr* Court recognized a "sham" exception: if petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," Sherman Act liability is justified. *Noerr* at 144. However, it is not a sham if the activity is "a genuine effort to influence legislation and law enforcement practices." *Id.*

The concept of the sham exception was further refined in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). In that case, defendants allegedly conspired to monopolize trade and

commerce in the transportation of goods by instituting administrative and judicial proceedings "to resist and defeat [plaintiffs'] applications . . . to acquire operating rights or to transfer or register those rights." The Court, recognizing the applicability of *Noerr* to petitioning in the courts, distinguished administrative and adjudicatory fora from the legislative lobbying at issue in *Noerr*. Noting that certain types of unethical conduct, "condoned in the political arena," were sanctionable in the adjudicatory context, the Court implied that the scope of protected petitioning activity was narrower in adjudicatory fora than for legislative lobbying. *Trucking Unlimited* at 513. The Court held that institution of baseless, repetitive claims, in order to effectively bar competitors from meaningful access to administrative agencies and the courts, was not "political expression" entitled to First Amendment protection. Such activity fell within *Noerr's* sham exception, "as adapted to the adjudicatory process." *Trucking Unlimited* at 516.

The *Noerr-Pennington* rationale was adapted to the labor context in *Bill Johnson's Restaurants Inc. v. NLRB*, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983), where the Court was presented with an alleged unfair labor practice in the form of a state lawsuit. An employer allegedly filed the state suit solely for the purpose of retaliating against an employee for exercising federally protected labor rights. The Court recognized that under a literal reading of the statutory language, the lawsuit would probably constitute an unfair labor practice. However, the Court acknowledged the First Amendment values underlying the *Noerr-Pennington* doctrine and their applicability in interpreting the unfair labor practice provisions in the NLRA. The Court also noted "the States' compelling interest in the maintenance of domestic peace." Barring a well-founded state lawsuit as an unfair labor practice would infringe on a state's interest in providing judicial remedies for its citizens. Based upon these First Amendment and federalism concerns, the Court held that a well-founded lawsuit, even if brought for an improper

purpose under the NLRA, was not an unfair labor practice under that statute.

B. *Defendants' Petitioning Activities*

1. *Legislative Lobbying*

The complaint alleges that defendants, in order to coerce plaintiffs unfairly, advocated passage of a local toxic waste ordinance which would prevent or impede plaintiffs' modernization project. After passage of the ordinance, defendants allegedly lobbied for its enforcement against plaintiffs.

The lobbying of state and local legislative bodies implicates the same First Amendment and federalism concerns at issue in *Bill Johnson's Restaurants*. The right to petition a legislative body falls squarely under the "umbrella of 'political expression'." *See Trucking Unlimited* at 512-513. As for federalism concerns, this Court will not lightly infer a Congressional intent to "ignore the substantial state interest in protecting the health and well-being of its citizens," *Bill Johnson's Restaurants* at 742 (citations omitted). Such an interest is clearly at stake when a toxic waste law is under consideration by a local legislative body. That an improper motive may have spurred defendants' lobbying efforts does not bring that petitioning activity within the ambit of federal proscriptions against unfair labor practices.

The complaint alleges nothing unlawful or improper about defendants' lobbying activities, except that such activity was coercive under the NLRA. There is no allegation that defendants' activities were other than "a genuine effort to influence legislation and law enforcement practices." *Cf. Noerr* at 144. There is no allegation that plaintiffs were denied "meaningful access" to present their own views before the Contra Costa County Board. *Cf. Trucking Unlimited* at

512. For the same reasons that a well-founded state lawsuit cannot be deemed an unfair labor practice, even if prosecuted with retaliatory intent, defendants' lobbying activities in the instant case do not constitute unfair labor practices.

Plaintiffs' first claim is therefore DISMISSED. Fed.R.Civ.P. 12(b)(6).

2. *State Court Action*

Defendants correctly identify the right of access to the courts as a protected First Amendment right. However, "just as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants* at 743. There is also no state interest at stake when the state suit is baseless. *Id.* In that situation, the only interest at stake is the strong federal interest in vindicating federal labor rights. Analogizing to the sham exception of *Trucking Unlimited, the Bill Johnson's Restaurants* Court held that a baseless state suit brought with retaliatory intent was an unfair labor practice.

Relying on *Bill Johnson's Restaurant* the Ninth Circuit has held explicitly that a union's prosecution of a suit which lacks a reasonable basis in law and which was filed with an improper motive constitutes an unfair labor practice. *International Longshoremen's and Warehousemen's Union v. Pacific Maritime Association, et al.*, 773 F. 2d 1012 (9th Cir. 1985). In the Court's view, it is appropriate to allow further time for discovery before ruling on this claim. Therefore, the motion is DENIED without prejudice. A renewed hearing is set for December 7, 1988. Defendant's motion papers should be filed by November 9, 1988.

III.

The final claim challenged in defendants' motions relates to defendants' alleged filing of collective bargaining grievances against a secondary employer, ECI. The complaint alleges improper motives.

Plaintiffs' own exhibits indicate that defendants' grievances against ECI were successful. As with well-founded state lawsuits, successful grievances to enforce lawful provisions of a collective bargaining agreement cannot constitute unfair labor practices, regardless of any motive to apply secondary pressure. *Truck Drivers, Union Local 705 v. N.L.R.B.*, 261 U.S. App. D.C. 40, 820 F.2d 448 (D.C. Cir. 1987). Plaintiffs do not claim that what was sought to be enforced was illegal. Nor do they deny that defendants' grievances were successful. Summary judgment as to plaintiff's fourth claim is therefore appropriate.

Accordingly, the motion is GRANTED.

IV.

Various defendants also seek sanctions. The Court DENIES these motions without prejudice. They may be raised again following the Court's ruling after the December 7, 1988 hearing.

IT IS SO ORDERED.

DATED: July 29, 1988

USS-POSCO INDUSTRIES and BE & K CONSTRUCTION COMPANY, Plaintiffs, v. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Defendants

No. C87-4829-DLJ
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

May 1, 1989, Decided
May 1, 1989, Filed

Defendants' motions for partial summary judgment, plaintiffs' motion to file an amended complaint, and defendants' motions to dismiss amended complaint and for sanctions were heard by the Court on April 12, 1989. ***

After considering the briefs submitted by the parties, the oral argument of counsel and the applicable legal standards, the Court hereby: (1) GRANTS defendants' motions for partial summary judgment; (2) partially GRANTS plaintiffs' motion to file an amended complaint; (3) partially GRANTS defendants' motions to strike or dismiss the amended complaint; and (4) DENIES defendants' motion for sanctions.

I.

Plaintiffs' action raises the issue of the scope of permissible activities through which labor unions may attempt to influence hiring and contracting decisions by employers.

Plaintiff USS-POSCO Industries ("UPI") is a general partnership formed between USX Corporation and Pohang Iron and Steel for the purpose of modernizing an outdated steel facility in Pittsburg, California. Plaintiff BE & K

Industries ("BE & K") is a non-union contractor to which UPI awarded the contract to modernize the facility. There are 12 defendants. Seven are locals of various unions associated with the AFL-CIO, and five are associations of labor unions.

In their original complaint, plaintiffs allege that defendants engaged in unfair labor practices under sections 8(b)(4)(ii) (A) and (B) of the NLRA, 29 U.S.C. §§ 158(b)(4)(ii) (A) and (B), by: (1) advocating for the adoption and enforcement of a toxic waste ordinance in Contra Costa County which would impede the modernization of the Pittsburg facility; (2) picketing and handbilling at plaintiffs' premises; (3) filling a lawsuit in state court, the "*Pile Drivers*" suit, alleging violations of the California Health and Safety Code; and (4) initiating collective bargaining grievance proceedings against Eichleay Constructors, Inc., a partner in a joint venture with plaintiff BE & K to perform the project contract.

The Court heard defendants' previous motion for partial summary judgment on June 1, 1988. In an Order dated July 29, 1988, the Court:

(1) granted the motion as to plaintiffs' first cause of action alleging improper lobbying of state and local legislative bodies;

(2) granted the motion as to plaintiffs' fourth cause of action for bad faith filing of collective bargaining grievances; and

(3) denied the motion, without prejudice, as to plaintiffs' third cause of action alleging bad faith filing of the *Pile Drivers* litigation in state court. *USS-POSCO v. Contra Costa County Bldg & Const. Trades Council, AFL-CIO*, 692 F. Supp. 1166 (N.D. Cal. 1988).

At the hearing on defendants' previous motion, the Court set a date in early December, 1988 to hear defendants' renewed motion for summary judgment of the third cause of action. The Court requested this second hearing to provide plaintiffs with more time for discovery pursuant to Federal Rule of Civil Procedure 56(f). As the December hearing date approached, a dispute arose between the parties regarding several depositions. The Court issued an Order on November 14, 1988, assigning the discovery dispute to the United States Magistrate and postponing the hearing date for the summary judgment motion until the depositions at issue were completed. Based on the representations made by both parties during oral argument, the Court is satisfied that the depositions underlying the continuance of these motions have been completed. Accordingly, defendants' motions for partial summary judgment are properly before the Court.

II.

Plaintiffs' third claim in the original complaint alleges that defendants committed an unfair labor practice by filing the *Pile Drivers* action in state court. Several of the defendants contend that they are not liable under this claim because they were not parties in the state court litigation. The remaining defendants assert that this claim is barred by the *Noerr-Pennington* doctrine. The Court finds both positions asserted by defendants persuasive.

Defendants IBEW Local 302, Steamfitters Local 342, Contra Costa Building and Construction Trades Council, Plasterers and Cement Masons Local 825 and IBOB Local 549 all contend that they should be dismissed from plaintiffs' third cause of action since they were not parties in the *Pile Drivers* suit. Plaintiffs concede that these defendants were not parties in the state action, but argue that these non-party defendants are still liable under the third cause of action because they are the agents of the defendants who were named in the state lawsuit. UPI's position is based on the

contention that these non-party defendants "played a central, integral role in the highly coordinated campaign against the UPI project, of which the *Pile Drivers* litigation is only a part."

Plaintiffs' position is incorrect. Even assuming that the *Pile Driver* litigation was part of a campaign to halt the UPI project, and that these non-party defendants were highly involved in that campaign, this factual background is not sufficient to hold these defendants liable under this claim. The non-party defendants cannot be held liable for a action based on the filing of lawsuit to which they were not parties. Because plaintiffs have failed to establish that these defendants were named parties in the *Pile Drivers* litigation, the non-party defendants' motions for partial summary judgment are hereby GRANTED.

Regarding the remaining defendants, as the Court's July 29, 1988 Order sets forth, in order to meet their burden of proof, plaintiffs must make an evidentiary showing which establishes both that the *Pile Drivers* suit "lacks a reasonable basis in law and . . . was filed with an improper motive" to state an actionable claim under the *Noerr-Pennington* doctrine. *USS-POSCO*, 692 F. Supp. At 1170 (citing *Int'l Lonshoremen's and Warehousemen's Union v. pacific Maritime Ass'n et al.*, 773 F.2d 1012, 1015 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158, 90 L. Ed. 2d 720, 106 S. Ct. 2277 (1986)); *see also Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983).

Therefore, to defeat defendants' motion for summary judgment, plaintiffs must make a showing sufficient to establish that a genuine issue of material fact exists as to whether (1) the *Pile Drivers* action had no reasonable basis in law, and (2) was motivated by an improper motive. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). Plaintiffs have failed to

satisfy this burden. There is no genuine issue of material fact regarding whether the state court action had a reasonable basis in law.

The *Pile Drivers* litigation sought to enjoin alleged violations of the California Health and Safety Code caused by the removal of hazardous waste materials from the UPI project site. Although the state court action was not successful on its merits,[1] that circumstance is not of itself evidence that the suit was filed without a reasonable foundation and plaintiffs have not provided evidence to support a conclusion that the action was filed without a legal basis. Following the instigation of the *Pile Drivers* litigation, Federal OSHA investigated the jobsite and found numerous health and safety violations. Plaintiffs have submitted no evidence to counter or explain away defendants' showing that the jobsite was cited for violations of health and safety regulations following the instigation of the *Pile Drivers* action. It is therefore clear that there is no genuine issue of material fact on the issue of whether or not health and safety problems existed on the UPI project when the *Pile Drivers* action was filed. Accordingly, the Court finds that the plaintiffs have cited no evidence which could support a finding that no reasonable legal and factual basis existed for the filing of the state court action.

Therefore, the Court hereby GRANTS defendants' motions for partial summary judgment and dismisses plaintiffs' third cause of action.

III.

Plaintiffs filed an amended complaint on October 3, 1988. Defendants contend that plaintiffs improperly amended

1 Defendants' motion for a temporary restraining order and for a preliminary injunction were both denied by the presiding state court.

their complaint by alleging causes of action that were contained in the original complaint and that had previously been dismissed by the Court.

Before addressing the substance of the amended complaint, it must be determined whether plaintiffs are entitled to amend their complaint under the Federal Rules of Civil Procedure. Under Rule 15 of the Federal Rules, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served, otherwise a party may amend the party's pleading only be leave of the court or by written consent of the adverse party." Fed.R.Civ.P. 15(a).

In the present case, defendants IBEW Local 302 and Steamfitters Local 342 filed a "motion to dismiss and/or for summary judgment," but not an answer to plaintiffs' original complaint, before plaintiffs filed their first amended complaint. Because neither motions to dismiss or motions for summary judgment are responsive pleadings for purposes of Rule 15, *Allen v. Veterans Administration*, 749 F.2d 1386, 1388 (9th Cir. 1984); *Kirk v. United States*, 232 F.2d 763, 770 (9th Cir. 1956), plaintiffs are permitted to file an amended complaint against these two defendants as a matter of course.

The remaining defendants filed an answer to the original complaint prior to the filing of defendants' amended complaint. Thus, under Rule 15(a) plaintiffs may not amend as a matter of course against these defendants. However, after considering the record in this action and the oral argument of counsel, the Court GRANTS plaintiffs' motion under Rule 15(a) for leave to file an amended complaint. Plaintiffs may therefore file an amended complaint against all defendants.

Turning to the substance of plaintiffs' current amended complaint, the Court will not grant leave to file the amended complaint that is currently on file in this action. The current amended complaint is unacceptable because the first

cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court. Plaintiffs may not allege in their amended complaint causes of action which have already been removed from this action by summary judgment, whether or not they are asserted in combination with other valid or invalid claims. [2] The court therefore partially GRANTS defendants' motions to dismiss or strike plaintiffs' current amended complaint. Plaintiffs must file their revised amended complaint within twenty days from the date of this Order.

IV.

Finally, defendants have also filed a motion for sanctions against plaintiffs for filing their amended complaint. After considering the briefs submitted by the parties and the record in this case, the Court hereby DENIES defendants' motion for sanctions.

V.

Therefore, the Court hereby GRANTS defendants' motions for partial summary judgment, partially GRANTS plaintiffs' motion to file an amended complaint, partially

[2] There has not yet been a sufficient showing made to the Court that it would be futile to allow the second cause of action in the current amended complaint to be included in a subsequent amended complaint. However, this fact does not preclude defendants from bringing appropriate motions to challenge the validity of the antitrust claim when, and if, it is filed.

GRANTS defendants' motions to dismiss or strike the amended complaint, and DENIES defendants' motion for sanctions. A status conference will be held in this action on June 21, 1989 at 9:00 A.M. in the chambers of this Court.

IT IS SO ORDERED.

DATED: May 1, 1989.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, et al.,	)
	) C87-4829-DLJ
Plaintiffs,	) ORDER
	) PARTIALLY
CONTRA COSTA BUILDING &	) GRANTING
CONSTRUCTION TRADES	) DEFENDANTS'
COUNCIL, AFL-CIO, et al.,	) MOTION
	) TO STRIKE AND
Defendants.	) FOR SANCTIONS

The Court heard defendants' motion to strike or dismiss plaintiffs' second amended complaint and for sanctions on August 16, 1989. James G. Gilliland of Khourie, Crew and Jaefer appeared for plaintiffs. Victoria Chin of Neyhart, Anderson, Nussbaum, Reilly and Freitas appeared for defendants IBEW Local 302 and UA Local 342. Sandra Rae Benson of Van Bourg, Weinbe.g, Roger and Rosenfeld appeared for all other defendants.

In their original complaint, plaintiffs alleged that defendants engaged in unfair labor practices under sections 8(b) (4) (ii) (A) and (B) of the NLRA, U.S.C. §§ 158(b) (4) and (ii) (A) and (B), by: (1) advocating for the adoption and enforcement of a toxic waste ordinance in Contra Costa County which would impede the modernization of plaintiffs' steel facility: (2) picketing and handbilling at plaintiffs' facility: (3) filing a lawsuit in state court alleging violations of the California Health and Safety Code: and (4) initiating collective bargaining grievance proceedings against Eichleay Constructors, Inc., partner in a joint venture with plaintiff BE&K.

The Court heard defendants' first motion for partial summary judgment on June 1, 1988. In an Order dated July 29, 1988, the Court: (1) granted the motion as

to plaintiffs' first cause of action alleging improper lobbying activities; (2) granted the motion as to plaintiffs' fourth cause of action for bad faith filing of collective bargaining grievances;[1] and (3) continued hearing on the motion pursuant to Federal Rule of Civil Procedure 56(f) as to plaintiffs' third cause of action alleging bad faith filing of litigation in state court, *USS-POSCO v. Contra Costa County Bldg & Const. Trades Council AFL-CIO*, 692 F.Supp. 1166 (N.D.Cal. 1988). The Court granted the Rule 56(f) continuance as to plaintiffs' third cause of action to allow the parties more time to conduct discovery regarding the Pile Drivers litigation.

Prior to the hearing date set for the continued motion for summary judgment of plaintiff's original third cause of action, plaintiffs improperly filed a first amended complaint on October 3, 1988. This amended complaint contained causes of action for: (1) violation of section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, based on various acts by defendants, including acts that formed the basis for several of the claims previously removed from this action by the Court pursuant to defendants' June 1 summary judgment motion; and (2) violations of the Sherman Act, 15 U.S.C. §§ 1 and 2.

Defendants' motion for summary judgment of plaintiffs' original third cause of action, the Pile Drivers claim, and a motion to dismiss or strike plaintiffs' improperly filed amended complaint that were heard by the Court on April 12, 1989. On the same date, the Court heard plaintiffs' motion to file an amended complaint. Following the hearing, the Court: (1) granted defendants' motion for summary judgment of plaintiffs' third cause of action, finding that the state court Pile Drivers litigation

[1] The decision of the court to grant summary judgment was based on a finding by the Court that the conduct at issue was constitutionally protected.

was filed in good faith;[2] (2) partially granted defendants' motion to dismiss or strike plaintiffs' amended complaint; and (3) partially granted plaintiffs' motion to file an amended complaint by Order dated May 1, 1989. Specifically, the Court refused to accept plaintiffs' October 3 amended complaint as filed, but granted plaintiffs leave to file another amended complaint. In this regard, the Court stated that:

> [t]he current amended complaint is unacceptable because the first cause of action includes a restatement of several of the claims upon which summary judgment for defendants has already been granted by the Court. Plaintiffs may not allege in their amended complaint causes of action which have already been removed from this action by summary judgment, whether or not they are asserted in combination with other valid or invalid claims.

May 1 Order at 8-9.[3]

> Plaintiffs filed a 46 page second amended complaint on May 22, 1989, alleging causes of action for: (1) antitrust violations under the Clayton Act and Sherman Act: (2) violation of section 303 of the LMRA, 29 U.S.C. 1 187, based on defendants' attempt to coerce plaintiffs into entering a "hot cargo" agreement through the filing of state and federal actions, picketing activities, lobbying activities, and filing of labor grievances; (3) violation of section 303 based on defendants' "picketing handbilling and work stoppages;" (4) violation of section

[2] This decision was also based on a finding that defendants' actions are constitutionally protected.

[3] In footnote 2 of the May 1 Order, the Court stated that it would allow plaintiffs to allege an antitrust claim in their amended complaint. This ruling was made without prejudice to any motions by defendant challenging the substance of such claims.

> 303 based on defendants' lobbying activities directed towards the enactment of a toxic waste ordinance in Contra Costa County; (5) violation of section 303 based on defendants' filing of the Pile Driver's lawsuit; and (6) violation of section 303 based on defendants' filing of grievance proceedings.

Plaintiffs acknowledge that the Court granted summary judgment in favor of defendants as to their fourth fifth and sixth causes of action. However, plaintiffs contend that they have replead this causes of action to preserve their on rights on appeal.

Defendants seek to strike or dismiss all of plaintiffs' causes of action and for sanctions against plaintiff for disobeying the Court's May 1 Order.

After review of the briefs, the record in this action and the applicable legal standards, the Court hereby partially GRANTS defendants' motion to strike, and GRANTS defendants' motion for sanctions.

I.

As previously described, the Court's May 1 Order explicitly states that "plaintiffs may not allege in their amended complaint causes of action which have already been removed from this action by summary judgment, whether or not they are asserted in combination with other valid or invalid claims." In their fourth, fifth and sixth causes of action, plaintiffs have alleged causes of action for which this Court has previously granted summary judgment for defendants. Plaintiffs acknowledge that they have done this, but claim that they were required to replead these claims to preserve their right on appeal. Plaintiffs' position is completely without merit.

Plaintiffs contend that the "repleading" rule that they rely upon pertains to both motions to dismiss when

leave to amend is granted and Rule 56 motions for summary judgment. In support of their position, plaintiffs cite language from the Ninth Circuit's decision in *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981), stating that "[I]t has long been the rule in this circuit that a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." Plaintiffs contend that this language is so "broad" that they were required to replead the removed causes of action to avoid any risk of losing their right of appeal. However, plaintiffs made no reasoned argument addressing the obvious factual distinction that in London, the Ninth Circuit was referring to an amended complaint filed after a motion to dismiss had been granted with leave to amend. London, 644- F.2d at 813. Plaintiffs concede that they cannot produce any legal authority supporting their position that the same "repleading" rules applies to causes of action upon which summary judgment has been granted for defendants.[4]

The "repleading" rule that plaintiffs rely upon only applies to the granting of motions to dismiss with leave to amend under Federal Rule of Procedure 12(b)(6) or the filing of an amended complaint upon the plaintiff's own initiative. King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987); London v. Coopers & Lybrand, 644 F.2d at 814. This is not the situation in the present cast as the Court granted defendants' motion for summary judgment of these claims and only granted leave to file an amended complaint that

[4] Also undermining plaintiffs' argument based on the Ninth Circuit's "repleading" rule is plaintiffs' failure to replead the fourth cause of action in the original complaint in their first amended complaint. Had the Court allowed plaintiffs to file their first amended complaint, plaintiffs, under their interpretation of the Ninth Circuit's pleading requirements, would have waived any appeal regarding the Court's granting of summary judgment for defendants as to plaintiff's original fourth cause of action. Plaintiffs' inconsistent application of their interpretation of the "repleading" rule creates serious doubts about the credibility of their position.

did not include either the claims for which summary judgment had already been granted, or mixed claims containing valid claims and repleaded claims that the Court had already adjudicated on the merits. Thus, plaintiffs did not have leave to file their present fourth, fifth or sixth causes of action. Accordingly, based on the Court's May 1 Order, defendants' motion to strike is hereby GRANTED as to plaintiffs' fourth, fifth and sixth causes of action.

II.

The Court has not yet ruled on the merits of plaintiffs' first, second and third causes of action. However, each of these claims contains, inter alia, repleading of the claims that were removed from this action under Federal Rule of Civil Procedure 56. Moreover, the Court's May 1 Order explicitly prohibits plaintiffs from alleging mixed claims which replead causes of action that the Court has already removed from the lawsuit. Therefore, defendants motion to strike is GRANTED as to those portions of plaintiffs' first, second and third causes of action which have previously been ruled on by the Court.

Defendants have submitted a supplemental briefing indicating those portions of the first, second and third causes that should be removed from the complaint consistent with this Order. Plaintiffs may file a response to this briefing within 20 days from receipt thereof.

III.

Defendants contend that sanctions should be awarded against plaintiffs pursuant to Federal Rule of Civil Procedure based on the filing of plaintiffs' second amended complaint.

Rule 11 of the Federal Rules of Civil Procedure states that:

> [t]he signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose.

Fed. R. Civ. P. 11 (emphasis added).

The Court finds that Rule 11 sanctions are warranted against plaintiffs for the filing of their amended complaint. This finding is predicated on (1) plaintiffs' failure to comply with the Court's May 1 Order, and (2) their misrepresentation to the Court of the Ninth Circuit's "repleading" rule.

Plaintiffs have clearly violated the court's May 1 Order by repleading causes of action for which summary judgment was granted for defendants. The Court's Order explicitly states that such causes of action were not to be included in plaintiffs' amended complaint, whether or not they were combined with otherwise valid causes of action. In fact, plaintiffs concede that they have directly violated the Court's ruling in footnotes to their fourth, fifth and sixth causes of action. Plaintiffs contend that the repleading of these claims was necessary under the "repleading" doctrine within the Ninth Circuit. This argument, as previously discussed, is without merit and provides more justification for the Court to impose sanctions.

Under Rule 11, an attorney's signature constitutes a certificate that a pleading is "warranted by existing law or a good faith argument for the extension . . . of existing law." The Court finds that plaintiffs' interpretation of the Ninth Circuit's "repleading" rule is neither. It is clear,

based upon the cases cited by plaintiffs in support of their position, that the rule does not apply to Rule 56 motions. If the Court adopted plaintiffs' position, it would be required to allow all parties who had a claim removed from a lawsuit by a motion or summary judgment to replead that cause of action to preserve their appeal. If this were the law in the Ninth Circuit, district courts would effectively be unable to remove claims from lawsuits under Rule 56 as plaintiffs would be allowed to replead claims following the granting of a defendant's motion for summary judgment. The Court finds that plaintiffs' interpretation of the "repleading" doctrine is not warranted by existing law or a good faith argument for its extension.

Therefore, defendants will sub mit to the Court an accounting of the expenses incurred in filing the present motion to strike as to plaintiffs' second amended complaint by August 23, 1989. The Court will then issue an Order indicating the amount of sanctions to be awarded against defendants.

IV.

Therefore, defendants' motion to strike is hereby partially GRANTED, and defendants' motion for sanctions is hereby GRANTED.

IT IS SO ORDERED.

DATED: August 23 , 1989.

/s/
D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF-CALIFORNIA

USS-POSCO INDUSTRIES, et al.,	)	
	)	
Plaintiffs,	)	
	)	C87-4829-DLJ
v.	)	
	)	
CONTRA COSTA BUILDING &	)	ORDER
CONSTRUCTION TRADES	)	AWARDING
COUNCIL, AFL-CIO, et. al.	)	ATTORNEYS'
	)	FEES
Defendants.	)	
	)	

On August 24, 1989, the Court issued its Order Partially granting Defendants' Motion to Strike and Granting Defendants' Motion for Sanctions. The Court found that, notwithstanding the Court's May 1 Order prohibiting repleading of claims upon which summary judgment had been granted, the fourth, fifth and sixth claims of the second amended complaint were so repleaded. The Court further found that this repleading of claims was not warranted by existing law or by a good faith argument for its extension. Pursuant thereto, the Court instructed defendants to submit an accounting of expenses incurred in filing the motion to strike as to the second amended complaint. Counsel for defendants submitted three declarations supporting two claims for attorneys' fees incurred: (1) the firm of Neyhart, Anderson, Nussbaum, Reilly and Freitas ("Neyhart") submitted a claim in the amount of $13,890 based on the Declaration of Victoria Chin, which, after correction of a miscalculation, is adjusted to $13,770; (2) the firm of Van Bourg, Weinberg, Roger and Rosenfeld ("Van Bourg")

submitted a claim for $7;537.50 based on the Declarations of Victor J. Van Bourg and Sandra Rae Benson, which, after correction of a miscalculation, is adjusted to $7,675.00. Plaintiffs submitted a Response to these claims, and defendants filed further declarations in reply.

The Court has considered the papers submitted by counsel and has apportioned the above claims to reflect the time spent in opposing claims found to be repleaded. On that basis the Court ORDERS plaintiffs to pay to defendants their attorneys fees in the following amounts:

1. As to the Neyhart claim, $8,614.50: and

2. As to the Van Bourg claim, $5,291.87.

IT IS SO ORDERED.

DATED: September 29, 1989

/s/
D. Lowell Jensen
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, et al., Plaintiffs, v. CONTRA COSTA BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., Defendants.	ORDER STRIKING PORTIONS OF COMPLAINT

On August 24, 1989, the Court issued its order Partially Granting Defendants' Motion to Strike and Granting Defendants' Motion for Sanctions. The Court found that, notwithstanding the Court's May 1 order prohibiting repleading of claims upon which summary judgment had been granted, the fourth, fifth and sixth claims of the second amended complaint were so repleaded. The Court further found that this repleading of claims was not warranted by existing law or by a good faith argument for its extension. Therefore, the Court GRANTED defendants' motion to strike as to the fourth, fifth, and sixth causes of action in the second amended complaint. The Court further GRANTED the motion to strike as to those portions of the first, second, and third causes of action which replead claims removed by the earlier grant of summary judgment. Defendants were instructed to submit a form of order striking specific portions of the first, second and third causes of action, and this form of order was received August 23, 1989. On August 30, 1989, plaintiffs filed an opposition and alternative form of order specifying portions of the

complaint to be struck. Defendants' reply to this opposition was filed September 1, 1989.

Having reviewed the parties' draft orders and supporting briefs, as well as the Courts prior orders and the applicable law, the Court hereby STRIKES the following portions from the first, second and third causes of action in the second amended complaint:

Page	Paragraph	Lines	Portions to Strike
15	25	7-13	"This scheme… shop contractors."
15	27		
16-17	30(a)-(b)		
19-22	31(a)-(c)		
26-27	32(b)(I)		
29	32(b) (xxii)–(xxvi)		
37-38	51-55		
38-40	56-64		
41-43	65-74		
44	Prayer for Relief 1(a)(ii)	8	"Seeking any governmental action or"
44	Prayer for Relief 1(a)(iii)	12	"Seeking any governmental action or"

45	Prayer for Relief 2	1	"Fourth, Fifth and Sixth"

Defendants may file their answer or other response to the second amended complaint with portions struck as ordered above within 20 days from receipt of this Order. Nothing in this Order precludes defendants from bringing appropriate motions to challenge the remaining claims in the second amended complaint.

IT IS SO ORDERED.

DATED: November 20, 1989

/s/
D. Lowell Jensen
United States District Judge

USS-POSCO INDUSTRIES v. TRADES COUNCIL

U.S. District Court,
Northern District of California

USS-POSCO INDUSTRIES, et al. v. CONTRA COSTA BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. C87-4829-DLJ, June 8, 1990

***

Full Text of Opinion

JENSEN, District Judge: — On March 14, 1990, the Court heard defendants' motion for partial summary judgment on the issue of the scope of the statutory labor exemption to the antitrust laws, and to limit discovery in accordance with the scope of the exemption. Appearing for plaintiff BE&K Construction Company ("BE&K") were James G. Gilliland of Khourie, Crew & Jaeger, P.C., San Francisco, California, and Daniel I. Booker of Reed, Smith, Shaw & McClay, Pittsburgh, Pennsylvania (admitted pro hac vice). Appearing for defendants were Victor Van Bourg and Sandra Rae Benson of Van Bourg, Weinberg, Roger & Rosenfeld; and Peter D. Nussbaum of Neyhart, Anderson, Nussbaum, Reilly & Freitas, San Francisco, California.

After review of the briefs submitted by the parties, the oral argument of counsel, and the applicable legal standard, the Court hereby GRANTS the motion for partial summary judgment and limits discovery accordingly, as described below.

I. BACKGROUND

The Second Amended Complaint alleges at the First Claim for Relief that defendants combined and conspired with "other persons both affiliated and not affiliated with any

labor union" to restrain interstate trade and commerce by attempting to force non-union contractors out of construction projects in Contra Costa County, California. Second Amended Complaint ¶35. Such combinations are alleged to have been made in violation of Sections 4 and 14 of the Clayton Act, 15 U.S.C. §§15, 26, and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2. The unions' defense of this claim is based in part on the statutory exemption from antitrust laws derived from the Clayton Act and the Norris-LaGuardia Act for concerted actions of unions in labor disputes. *See* 15 U.S.C. §17; 29 U.S.C. §52; 29 U.S.C. §§104, 105, 113; *Mine Workers v. Pennington,* 381 U.S. 657, 662, 85 S.Ct. 1585, 1589, 14 L.Ed.2d 626 [59 LRRM 2369] (1965).

This motion is brought to establish the scope of the statutory exemption for purposes of limiting discovery in this action. Plaintiffs argue two theories for imposing antitrust liability on defendants: (1) that defendants conspired with non-labor parties to restrain activities by non-union contractors on construction projects in Contra Costa County; and (2) that certain unilateral activities of defendants violated the National Labor Relations Act and other federal laws and had as their purpose to directly and substantially affect commercial competition in the construction market in Contra Costa County. On this basis, plaintiffs seek to discover facts related solely to the motivations of defendants and affiliated labor groups and the effect of their activities on commerce. Defendants seek to limit discovery to inquiry into possible combinations formed with competitors of plaintiffs for a purpose not growing out of a labor dispute.

II. DISCUSSION

A. Standard for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted when "the

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law."

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, *'specific acts* showing that there is a genuine issue for trial.'" *T.W. Electric Service, Inc. v. Pacific Elec. Contractors,* 809 F.2d 626, 630 [124 LRRM 2575] (9th Cir. 1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 2553 (1983); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.,* 793 F.2d 1100, 1103-04 (9th Cir.), *cert. denied,* 107 S.Ct. 435 (1986)) (emphasis in original). Although reference is made to the moving party's "burden" under this rule, it should be noted that Rule 56 places no burden on the defendants beyond that which they require to prevail at trial: the adverse party may not rest on its allegations. *First National Bank v. First Bank Stock Co.,* 306 F.2d 937, 943 (9th Cir. 1962).

When judging the evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and is required to draw all inferences in a light most favorable to the non-moving party. *T.W. Electric,* 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986)). Summary judgment may issue "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 106 S.Ct. at 2552. The standard for judging either a defendant's or plaintiff's motion for summary

judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512 (1986).

B. The Statutory Labor Exemption from Antitrust Laws.

Two statutes construed together have the express effect of exempting concerted labor party union activity, such as boycotts and second pickets, from liability under the antitrust laws: the Clayton Act §§6, 20, 15 U.S.C. §17 and 29 U.S.C §52; and the Norris-LaGuardia Act, 29 U.S.C. §§104, 105, and 113. Together these provisions create the statutory labor exemption, which, however, does not apply to concerted action or agreements between unions and "non-labor" parties. *Mine Workers,* 381 U.S. at 662, 85 S.Ct. at 1589, *cited in Connell Cost. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 922, 95 S.Ct. 1830, 1835 [89 LRRM 2401] [(1975).

The Norris-LaGuardia Act bars federal courts from issuing injunctions in cases "involving or growing out of any labor dispute" against persons "participating or interested in such disputes" to prohibit certain acts in promotion of their interest in the dispute, "whether singly or in concert." 29 U.S.C. §104. A "labor dispute" is defined in the Act as "any controversy concerning the terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." *Id.* §113(c).

The Clayton Act exempts from the antitrust laws activities "lawfully carrying out the legitimate objects of"

labor organizations. 15 U.S.C. §17. Activities specifically included in this exemption are, in addition to work stoppage, "attending at any place where any such person … may lawfully be, for the purpose of peacefully persuading any person to work or to abstain from working;" and in addition to boycotts "recommending, advising, or persuading others by peaceful and lawful means to do so;" as well as "peaceably assembling in a lawful manner, and for lawful purposes." 29 U.S.C. §52.

Therefore, the express language of the statutes, construed together, appears to require that an exemption from antitrust liability rest only on lawful activity carrying out legitimate objectives. However, decisional law has created a buffer for arguably illicit activities serving legitimate union goals by defining two elements of the statutory exemption: (1) who may be a "labor party" involved in a labor dispute with the union; and (2) what ends are legitimate, including using forceful means to gain the opportunity to represent a disputant's employees.

1. The Combination Requirement.

Although axiomatic, it is helpful to begin with the observation that a colorable antitrust claim must allege a combination or conspiracy in restraint of trade or commerce. Sherman Act, 15 U.S.C. §1. The "scope" of the exemption that the parties address is really a determination of whom a labor union might combine with to subject it to civil antitrust liability notwithstanding the statutory exemption. *Cf. Allen Bradley Co. v. Local Union No. 3, Int'l Brotherhood of Electrical Workers,* 325 U.S. 797, 808, 65 S.Ct. 1533 [16 LRRM 798] (1944), *reh. denied,* 326 U.S. 80 (1945) (by creating the statutory labor exemption, "we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.")

[1] The statutory labor exemption arises where two conditions are met: that a challenged combination is with a labor group and that such combination is with the union's "self-interest," "involving or growing out of [a] labor dispute." *U.S. v. Hutcheson,* 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 [7 LRRM 267] (1941). In the first instance, the Court must consider whether these conditions are mutually dependent, i.e., whether a union's interest may *only* be examined where a combination with non-labor groups occurs, as the unions assert; or whether, as plaintiffs argue, evidence of lack of self-interest (and thus absence of a true labor dispute) defeats the exemption for unilateral union activity. The Court must reject plaintiffs' position, for its necessary corollary is that, because by definition a labor union is a combination of workers seeking to limit wage competition, a single union may conduct activities outside the statutory exemption. Such a reading of the antitrust laws is contrary to the express language of Section 6 of the Clayton Act, which states,

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor [organizations] … instituted for the purposes of mutual help …; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. §17. Thus the Supreme Court articulated the policy of the Clayton Act and the Norris-LaGuardia Act:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Hutcheson, 312 U.S. at 232. By declining to judge the "wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness" of a union's activities, the Court will necessarily defer consideration of the issue of a valid labor dispute until there is a determination of combination with a non-labor group: for the Sherman Act is not to be a tool of local law enforcement, but is "devoted to quite different ends," i.e., the preservation of fair competition. *Bodine Produce, Inc. v. United Farm Workers Organizing Comm.,* 494 F.2d 541, 559 [85 LRRM 2875] (9th Cir. 1974); *see also, Allen Bradley Co., supra,* 325 U.S. at 810 ("It is also true that the Sherman Act 'draws no distinction between the restraints effeced by violence and those achieved by peaceful … means.'" (quoting *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 513, 60 S.Ct. 982 [6 LRRM 647] (1940).

[2] This reasoning applies as well to violations of statutory restraints on labor under the National Labor Relations Act. That is to say, the Sherman Law is not a means of enforcing labor laws which have their own remedial scheme; rather, it is designed for its own ends and may be invoked along with labor law remedies only where a legitimate threat to competition exists. Therefore, the Court finds that plaintiffs will ultimately bear the burden of showing *both* a combination with non-labor groups *and* an illegitimate purpose in such combination in order to prevail in this action.

2. "Non-Labor Groups."

[3] The courts give a broad definition to "labor group" in order to permit unions to obtain objectives otherwise unlawful under the Sherman Act. Indeed, the net of the "labor group" requirement casts broadly enough to bring in all parties united with the defendant unions' efforts except for those non-labor commercial groups capable of creating business monopolies and controlling the relevant market of goods and services. *See Allen Bradley Co., supra,* 325 U.S. at 807-09. *Accord, Bodine Produce, supra,* 494 F.2d at 558 ("The mere combination by a union with 'non-labor groups' does not violate the Sherman Act. To hold otherwise would invalidate collective bargaining. Whether the combination violates the antitrust laws turns on the purposes served thereby."); *Adolph Coors Co. v. Wallace,* 115 LRRM 3100, 3107 (N.D.Cal. 1984) ("[T]he [union] defendant must not act with, or on behalf of, entities with commercial or competitive goals to that of the targeted plaintiffs."). Most assuredly included in the "labor group" ambit are parties having an economic interrelationship affecting legitimate union interests, even where such parties are not traditional labor organizations. *E.g., H.A. Artists & Assoc. v. Actors' Equity Ass'n,* 451 U.S. 704, 101 S.Ct. 2102 [107 LRRM 2394] (1981) (applying rule of *American Federation of Musicians v. Carroll,* 391 U.S. 99, 106, 88 S.Ct. 1562 [68 LRRM 2230], reh. denied, 393 U.S. 902 (1968), to identify theatrical agents subject to actors' union licensing system as a "labor group" for antitrust analysis purposes).

[4] Therefore, the Court's determination of the scope of the statutory exemption from antitrust liability for labor flows directly from the Supreme Court's longstanding rule stated in *Allen Bradley Co.:* the exemption is destroyed when unions participate in a combination with business

people possessing power to eliminate all competition among themselves and to prevent competition from others. 325 U.S. at 809.

Once a combining party is established to be a non-labor group, as *Bodine, supra,* recognized, a further inquiry is required into the purposes of the combination, on the one hand because the action may not be legitimately in the union's interest and, on the other, because not all combinations with non-labor groups are subject to the antitrust laws.

3. "Labor Dispute."

To retain its statutory exemption, a union combining with a non-labor group must also act in its self-interest, i.e., its activities must "bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg v. William Morris Agency,* 411 F.Supp. 403, 410 [92 LRRM 2232] (C.D.Cal. 1976), *quoted in Allied Int'l. Inc., v. International Longshoremen's Ass'n AFL-CIO,* 640 F.2d 1368, 1380 [106 LRRM 2659] (9th Cir. 1981), *aff'd,* 456 U.S. 212 [110 LRRM 2001] (1982).

In barring injunctions of union activities pursuant to a "labor dispute," Section 13 of the Norris-LaGuardia Act broadly defines a "labor dispute" as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment…". 29 U.S.C. §113(c). Congress deliberately drafted a broad definition to cover a broad range of labor purposes, including political or other non-economic motives, as long as "the employer-employee relationship is the matrix of this controversy." *Jacksonville Bulk Terminals, Inc., v. International Longshoremen's Ass'n,* 457 U.S. 702, 712-13, 102 S.Ct. 2672, 2680 [110 LRRM 2665] (1982).

Under this rule the courts broadly construe what may be a legitimate union purpose behind the alleged combination. Thus, in *Bodine Produce,* an "overwhelmingly predominant purpose" of securing employer recognition of the union supported the legitimacy of the union's entering into boycott agreements with the customers of targeted grape growers. 494 F.2d at 558. Plaintiff's argument that legitimate purposes are only those affecting wage and working conditions of union members — implicitly disregarding the union's self-interest in becoming the bargaining representative for some or all of plaintiff's workers —is far too narrow. In the present action, it is clear that the union's interest in maintaining area wage standards and working conditions forms the matrix of the controversy.

Plaintiffs argue, however, that the union's alleged sham challenges to the construction of the UPI plant on environmental grounds, and the alleged instigation of lawsuits by non-union members cannot be said to relate to a legitimate union interest, because the claimed goals of these actions could not benefit union members. Plaintiffs rely on *H.A. Artists and Allied International.* The Court is not persuaded that these cases are on point with the present action.

In *H.A. Artists,* the Supreme Court considered whether Equity regulation of theatrical agents was "clearly designed to promote the union's legitimate self-interest," and found that it was, except for a single component, the practice of charging the regulated agents a fee to administer the system. 101 S.Ct. at 2111-12. The Court found that on the record there was insufficient evidence that the regulatory system could not exist without the fee, and remanded for further proceedings on that issue. *Id.* at 2113. The Court clearly implied that a fee necessary to the functioning of the inarguably legitimate licensing system would also be legitimate. Thus remand was required simply to assure the integrity of the licensing system and not for a closer

examination of the legitimacy of that system. In the present action, even if some colorable allegation regarding the integrity of union means of pursuing the environmental challenge were offered, an improper element of the challenge would not render the entire environmental challenge itself destructive of the statutory exemption.

Similarly, *Allied International* does not dictate a broad rule that political disputes cannot relate to legitimate union interests, nor could it, in view of the Supreme Court' later holding in *Jacksonville Bulk Terminals* that political or other noneconomic motives do not take an action outside the definition of a "labor dispute." 102 S.Ct. at 2680-81. In *Allied International,* the Ninth Circuit simply upheld without explication the district court's conclusion that the political dispute in that particular case, i.e., protest of the Soviet invasion of Afghanistan, did not relate to a legitimate union interest "as that term has been defined in American labor history and law." 640 F.2d at 1380. The real inquiry, as the *Allied International* court noted, is whether the union's activities had "objectives that are at the heart of national labor policy." *Id.*

The heart of this dispute is a contest between the unions and non-union employers regarding representation of plaintiffs' employees and maintenance of area standards for wages and other working conditions. The statutory labor exemption for antitrust does not require that each dispute in a protracted and complex controversy such as that underlying the present litigation be itself definable as a labor dispute. Rather, it is sufficient that the controversy involve any labor dispute. *See Jacksonville Bulk Terminals,* 102 S.Ct. at 2679 (interpreting the Norris-LaGuardia Act).

It appears that here, as in *Bodine Produce,* the unions' overwhelmingly predominant purpose was with becoming the bargaining representatives of plaintiffs' employees and maintaining established wage rates and working conditions in

Contra Costa County. Therefore, possible noneconomic motives of the unions themselves, distinct from any combination formed with non-labor groups, may not be the subject of discovery in this action.

III. CONCLUSION

[5] For the foregoing reasons, the Court hereby GRANTS the motion for partial summary judgment and finds that the statutory exemption from antitrust liability extends to all combinations made by unions except for those with non-labor parties, i.e., contractors, manufacturers, or other commercial entities involved in the same market for selling construction services as plaintiffs, which combinations are made for any anticompetitive or other purpose not related to legitimate union goals arising from a labor dispute.

Pursuant to this finding, the Court hereby LIMITS the scope of discovery in this action as follows: Discovery in support of the antitrust claim in the Second Amended Complaint shall be limited to inquiry into whether defendants entered into combinations with contractors, manufacturers, or other commercial entities involved in the same market for selling construction services as plaintiffs; and whether such combinations, if an, were made for some anticompetitive or other purpose not related to defendants' legitimate goals of becoming the bargaining representatives for plaintiffs' employees and maintaining area wage rates and working conditions.

A status conference is set in this matter for July 18, 1990, at 9:00 a.m.

IT IS SO ORDERED.

USS-POSCO INDUSTRIES v. TRADES COUNCIL

U.S. District Court,
Northern District of California

USS-POSCO INDUSTRIES, et al. v. CONTRA COSTA BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. C87-4829-DLJ, July 26, 1990

Order clarifying 134 LRRM 2590.

Full Text of Clarification Order

JENSEN, District Judge: — On June 8, 1990, the Court issued an Order Granting Motion for Partial Summary Judgment and Limiting Discovery in this action. Pursuant to the agreement of the parties and the Court at a status conference on July 18, 1990, the June 8 order is hereby clarified as follows:

1. Page 11, Lines 13-15 [134 LRRM Page 2594, Column 1, Lines 38-46]—The last sentence of the paragraph is now to read: "In the present action, a legitimate union interest is that of maintaining area wage standards and working conditions, and such an interest may form the matrix of the controversy."

2. Page 13, Lines 13-17 [134 LRRM Page 2594, Column 2, Second Full Paragraph]—The first sentence of the paragraph is stricken and the following sentence substituted for it: "Therefore, it is sufficient for the unions to assert as a defense that their alleged conduct occurred in connection with a recognized labor dispute—such as a contest to become the representatives of plaintiffs' employees and to maintain area standards for wages and other working conditions—to foreclose discovery into the unions' purpose underlying that conduct."

3. Page 13, Line 17 [134 LRRM Page 2594, Column 2, Second Full paragraph]—The first word of the last sentence in the paragraph ("Therefore,") is stricken so that the sentence now reads: "Possible non-economic motives of the unions themselves, distinct from any combination formed with non-labor groups, may not be the subject of discovery in this action."

IT IS SO ORDERED.

USS-POSCO INDUSTRIES, et al.,	)	
Plaintiffs,	)	
v.	)	No. C-87-4829
CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, et al.,	)	ORDER
Defendants.	)	

All defendants filed their joint motion for summary adjudication of plaintiff BE&K Construction Company's ("BE&K's") first claim for relief on July 25, 1991. The matter came on for hearing on August 21, 1991. James Gilliland appeared for plaintiff BE&K. Peter Nussbaum appeared on behalf of defendants IBEW Local 302 and USA Local 342. Sandra Benson appeared on behalf of all other labor union defendants.

This motion arises in the context of a suit which has already produced a substantial number of rulings on motions to dismiss and for summary judgment. On July 29, 1988, this Court dismissed plaintiff's first claim for relief from plaintiff's original complaint based on alleged violations of section 8(e) of the National Labor Relations Act. 28 U.S.C. §158(e). On May 1, 1989, the Court granted defendants' motion for partial summary judgment, eliminating plaintiff's claim that defendants had subjected plaintiff to sham litigation. Finally, on June 8, 1990, the Court granted defendants' motion for partial summary judgment restricting the scope of plaintiff's anti-trust claims against the defendant unions.

The present motions for summary judgment were filed on July 24 and July 25, 1991. In it pleadings filed in response to defendants' motion, and again at the hearing, plaintiff

BE&K stated its non-opposition to defendants' motion. In particular, plaintiff BE&K contended that the outcome of this motion would be controlled by the prior orders of the Court, especially the Court's Order of June 8, 1990. In light of these prior orders, and to expedite its own plans for appeal, BE&K does not oppose the defendants' motion.

In light of BE&K's non-opposition, and in light of the reasons expressed in the prior Orders of this Court, the Court GRANTS defendants' motion for summary adjudication of BE&K's first claim for relief.

IT IS SO ORDERED.

Dated: September 4, 1991.

/s/
D. Lowell Jensen
United States District Judge

***

IN THE UNITED STATES DISRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, a California General partnership, et al., Plaintiffs, vs. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, a voluntary, unincorporated Association, et al., Defendants.	No. C87-4829 DLJ ORDER FOR THE ISSUANCE OF FINAL JUDGMENT

WHEREAS, this Court has previously granted Summary Judgment in favor of Defendants and against Plaintiffs[1] in connection with the Fourth Claim for Relief of the Second Amended Complaint (LMRA § 303 [Toxic Waste Ordinance]), the Fifth Claim for Relief of the Second Amended Complaint (LMRA § 303 [the Piledrivers' litigation]), and the Sixth Claim for Relief of the Second Amended Complaint (LMRA § 303 [Grievance Proceedings]); and

[1] Plaintiff USS-POSCO Industries previously dismissed this action with prejudice as to its claims against defendants. Therefore, BE&K Construction Company is the only remaining plaintiff in this litigation.

WHEREAS, the Court has previously granted Defendants' Motion for Partial Summary Judgment as to Plaintiff's First Claim for Relief of the Second Amended Complaint (Antitrust Claim Under §§4 and 14 of the Clayton Act and §§1 and 2 of the Sherman Act); and

WHEREAS, the Court has previously dismissed with prejudice the Second Claim for Relief of the Second Amended Complaint (LMRA §303 [Hot Cargo/Secondary Boycott Violations]) and the Third Claim for Relief of the Second Amended Complaint (LMRA §303 [Picketing, Handbilling and Work Stoppages]), pursuant to Plaintiff's Motion for a Voluntary Dismissal with prejudice of these claims, and pursuant to Plaintiff's agreement that by so doing, it waives its right to appeal as to any matters contained in those claims which were not the subject of previous orders of this Court; and

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED THAT:

A Final Judgment shall issue in this case in favor of Defendants and against Plaintiffs and awarding those Defendants represented by Van Bourg, Weinberg, Roger and Rosenfeld their costs of suit in the amount of $4,914.22 and awarding those Defendants represented by Altshuler, Berzon, Nussbaum, Berzon & Rubin their costs of suit in the amount of $395.24, as reflected on the Cost Bills filed by the respective firms.

DATED: February 11, 1992

/s/
D. LOWELL
JENSEN
JUDGE OF THE
UNITED STATES
DISTRICT COURT

APPROVED AS TO FORM:

VAN BOURG, WEINBERG, ROGER & ROSENFELD

By /s/
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USS-POSCO v. TRADES COUNCIL

U.S. Court of Appeals,
Ninth Circuit (San Francisco)

USS-POSCO INDUSTRIES and BE&K CONSTRUCTIUON COMPANY v. CONTRA COST COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO, et al., No. 92-15497, July 26, 1994

***

Appeal from the U.S. District Court for the Northern District of California. Affirmed in part and reversed in part. See also 134 LRRM 2590 and 136 LRRM 2647.

***

Before KOZINSKI, THOMPSON, and THOMAS G. NELSON, Circuit Judges.

Full Text of Opinion

KOZINSKI, Circuit Judge: — We explore the nether reaches of two areas of antitrust law: the statutory labor exemption and the *Noerr-Pennington* doctrine.

I

USS-POSCO Industries (UPI) is a joint venture between USX Corporation (formerly U.S. Steel) and Pohang Iron and Steel Co. of South Korea, formed to modernize and operate an old steel facility in Pittsburg, California (PITCAL). Interested unions allegedly attempted to coerce UPI into awarding the general contract to a unionized contractor. After bidding, UPI nevertheless awarded the $350 million construction contract—involving over 800 jobs— to appellant BE&K, a merit-shop contractor. See Henry

Weinstein, *Workers Are Steeling Themselves to Fight Non-UnionUupgrading of Pittsburgh Plant*, L.A. Times, Mar. 16, 1987, at 3.

BE&K alleges the unions then began a campaign to eliminate non-union construction in Northern California by making an example of PITCAL. Although none of the unions had a collective bargaining agreement with BE&K, defendants allegedly filed automatic protests to BE&K's permits in order to cause it gratuitous expense and delay; lobbied for a local toxic waste disposal ordinance that would require BE&K to obtain more permits; sued to enforce the ordinance at the PITCAL site; encouraged BE&K's subcontractors to protest nonexistent safety violations; brought suit against BE&K for allegedly violating environmental laws (the P*iledrivers* suit); and brought numerous grievances, arbitrations and enforcement proceedings against BE&K's partner, Eichleay Constructions, Inc. (the *Eichleay* actions). According to BE&K, the unions' purpose was not to organize BE&K's employees, but to cause such delay and expense that future project owners would only hire unionized contractors and subcontractors.

UPI and BE&K originally brought suit alleging unfair labor practices under the LMRA, and the unions defended on the ground that their lobbying efforts, the *Piledrivers* suit and the *Eichleay* actions were immunized from LMRA liability under the *Noerr-Pennington* doctrine. *See Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (113 LRRM 2647) (1983) (applying *Noerr-Pennington* to labor context); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*,365 U.S. 127, 144 (1961) (legitimate petitioning of government immunized from antitrust laws). Rejecting BE&K's argument that the suits fell within the sham exception to *Noerr-Pennington*, the district court found that the lobbying of state and local bodies and the *Eichleay* actions were valid attempts to petition the government. After

discovery, the court granted partial summary judgment for the unions. ER 199.

BE&K filed an amended complaint which realleged the above-described conduct, this time claiming that it violated the Sherman and Clayton Antitrust Acts.[1] The court granted the unions' subsequent motion to dismiss on the ground that the amended complaint was foreclosed by the prior partial summary judgment. BE&K then filed its second amended complaint, basing it in part on the same activities the district court had ruled were protected by *Noerr-Pennington*. The court granted the unions' motion to strike those portions of the complaint dealing with the toxic waste ordinance, the *Piledrivers* suit and the *Eichleay* grievances. It also imposed Rule 11 sanctions on BE&K. ER 235 at 8-10.

The unions then advised the district court they intended to seek partial summary judgment on the antitrust claim on the ground that the surviving allegations involved activities protected by the statutory labor exemption. The court ruled that, in order to overcome the statutory exemption, BE&K would have to prove "*both* a combination with non-labor groups *and* an illegitimate purpose in such combination." ER 283 at 8 (emphasis added). The court then limited BE&K's discovery to the first of these elements. Because BE&K was unable to show a triable issue of fact as to whether there was a combination non-labor groups, the court granted the unions' subsequent motion for partial summary judgment.

BE&K stipulated to dismissal of its remaining claims with prejudice. It appeals only the antitrust claims and the imposition of sanctions.

1 UPI voluntarily dismissed its complaint against all defendants in February 1990, and is no longer a party to this suit. *See Firm, Building Trade, Settle Feud Over Environmental Concerns at Steel Plant*, Daily Lab. Rep. (BNA), Mar. 1, 1990 at A-8.

II

In *United States v. Hutcheson*, 312 U.S. 219, 232 (7 LRRM 267) (1941), the Supreme Court examined the "interlacing" Sherman, Clayton and Norris-LaGuardia Acts, and held that they gave unions a statutory exemption to the antitrust laws:[2]

> So long as a union *acts in its self-interest and does not combine with non-labor groups,* the licit and the illicit…are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Hutcheson, 312 U.S. at 232 (emphasis added). This passage has been read as establishing a two-prong test for the statutory labor exemption: (1) Did the union combine with a non-labor group? (2) Did the union act in its legitimate self-interest? *See, e.g., United Mine Workers of America v. Pennington*, 381 U.S. 657, 662 [59 LRRM 2369] (1965); *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797, 806-07 [16 LRRM 798] (1945); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 557-58 [85 LRRM 2875] (9th Cir. 1974). A key question in this case is whether these two prongs of *Hutcheson* are to be read in the conjunctive (*i.e.*, that plaintiff must establish both elements in order to the around the exemption), or in the disjunctive (*i.e.*,

[2] There is also a non-statutory exemption for agreements between unions and employers that are intimately related to the union's vital concern with wages, hours and working conditions. *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 622 (89 LRRM 2401) (1975); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 905 [9124 LRRM 2788] (9th Cir. 1987). As no such collective bargaining relationship existed here, the non-statutory exemption is not at issue.

that plaintiff can bypass the exemption by proving either element).

The district court read the *Hutcheson* test in the conjunctive and granted summary judgment on the antitrust claim because BE&K was unable to establish a triable issue of fact as to the first element—whether the unions had combined with non-labor groups. BE&K appeals this ruling, arguing first, that the district court defined non-labor group too narrowly; and second, that BE&K should have been allowed to show the union acted for an improper purpose, as an alternative avenue for defeating the statutory labor exemption.[3]

[3] BE&K also complains that the district court improperly assigned to it the burden of proving that the statutory labor exemption did not apply, since defendants normally bear the burden of proving exceptions to the antitrust laws. *See Feather v. UMWA*, 711 F.2d 530, 542 [113 LRRM 3367] (3rd Cir. 1983); *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F. 2d 494, 521 [100 LRRM 3170] (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 [104 LRRM 2687] (1980); 9 Julian O. Von Kalinowski, *Antitrust Laws and Trade Regulation*, §81.09(2) (1993). But the statutory exemption is not an affirmative defense; it's an element of any claim that unions violated the antitrust laws. Plaintiff bears the burden of proof. *See Pennington*, 381 U.S. at 669 ("the alleged agreement between UMW and the large operators…. if proved, was not exempt from the antitrust laws"); *Richard's*, 810 F.2d at 902 ("(f)ailure on the part of the plaintiff to produce evidence from which a jury could infer reasonably that conduct was conspiratorial, not unilateral, will lead to summary judgment for the defendant"); *Bodine Produce*, 494 F.2d at 561 (plaintiff must specifically allege non-labor group combination); *Mid-America Regional Bargaining Ass'n v. Will County Carpenters Dist. Council*, 675 F.2d 881, 886 (110 LRRM 2143) (7th Cir. 1982) ("if the defendants' conduct is to fall outside the statutory exemption, the plaintiffs must allege a conspiracy under *Allen Bradley*"). *But see United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1051 [75 LRRM 2208] (3d Cir. 1970) (union failed to meet burden of proving element of statutory exemption).

A. What constitutes a non-labor group for purposes of antitrust laws has never been very clearly defined.[4] It is possible, however, to derive a fair approximation of what the term means based on certain common-sense observations.

On the one hand, when a labor union combines with an entity that is competing in the plaintiff's market, this normally is deemed to be a combination with a non-labor group, stripping the union of the statutory labor exemption. *But see* n.5 *in/ra*. Thus, in most statutory labor exemption cases, the focus has been on whether the union combined with a competitor of the targeted employer. *See, e.g., H.A. Artists*, 451 U.S. at 715 (discussing non-labor group as "one or more employer"); *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 51 n.15 (97 LRRM 2809) (1978) (consideration whether there is "combination with nonlabor groups, i.e., whether there is not conspiracy with

[4] Indeed, the case law is saturated with confusing formulations. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 721 [110 LRRM 2665] (1982) (labor group depends on "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests") (quoting *American Federation of Musicians v. Carroll*, 391 U.S. 99, 106 [68 LRRM 2230] (1968); *H.A. Artists & Assocs. V. Actors' Equity Ass'n*, 451 U.S. 704, 717 [107 LRRM 2394] (1981) ("nonlabor group" consists of "persons who are not parties to a labor dispute" within the meaning of the Norris-LaGuardia Act) (quoting *Hutcheson*, 312 U.S. at 232); *Allen Bradley*, (1982) (labor group depends on "the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests") (quoting *American Federation of Musicians v. Carroll*, 291 U.S. 99, 106 (68 LRRM 2230) (1968)); *H.A. Artists & Assocs. V. Actors' Equity Ass'n*, 451 U.S. 704, 717 (107 LRRM 2394) (1981) ("nonlabor group" consists of "persons who are not 'parties to a labor dispute'" within the meaning of the Norris-LaGuardia Act) (quoting *Hutcheson*, 312 U.S. at 233); *Allen Bradley*, 325 U.S. at 798, 81, 809 (union lost statutory exemption where it combined with "employers and manufacturers of goods" to "aid and abet business men to do the precise things which the Act prohibits"; "when (a union participates) with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation (is) created not included within the exemptions of the Clayton and Norris-LaGuardia Acts").

management"); *Pennington*, 381 U.S. at 665-66 (union forfeited statutory exemption where it "agree(s) with one set of employers" to eliminate competition from the industry); *Allen Bradley*, 325 U.S. at 811 ("Congress evidently concluded…that the chief objective of antitrust legislation, preservation of business competition could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition."); *Bodine*, 494 F.2d at 560 ("alliance between the defendant union and non-labor business groups engaged in competition with the plaintiffs" constituted combination with non-labor group); see also Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶229e (1978).

At the other end of the spectrum, labor unions carrying out their normal functions must be free to hire law firms, contract for lease space and negotiate with other business entities, without risking antitrust liability. Even though many of the entities that unions deal with on a daily basis cannot fairly be described as labor groups, they are not deemed "non-labor groups" for purposes of the statutory labor exemption. Were it otherwise, this requirement—which lies at the heart of the test announced by *Hutchenson*—would be rendered utterly meaningless in the sense that *everything* unions do would become a combination with a non-labor group and possibly subject to antitrust liability.

To allow unions breathing space in carrying out their legitimate functions without giving them free reign to extend their substantial economic power into markets for goods and services other than labor, we conclude that the definition of non labor group must not stray too far from the paradigm of the union combining with the employer's competitors. To constitute a non-labor group for purposes of the statutory labor exemption, therefore, the entity in question must operate in the same market as the plaintiff to a sufficient degree that it would be capable of committing an antitrust violation against the plaintiff, quite independent of the

union's involvement. *See R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989) (en banc) ("The requirement that the alleged [antitrust] injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged male-factors.") (quoting *Bhan v. NME Hospital, Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985)); *see also Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 [112 LLRM 2753] (1983); Areeda & Hovenkamp, Antitrust Law at 400 ¶334.1b (1993 Supp.)

As noted, a competitor of the plaintiff clearly falls within that definition, as would a supplier or purchaser of the plaintiff's goods or services. *See, e.g., E.W. French & Sons, Inc. vs. General Portland, Inc.*, 885 F.2d 1392 (9th Cir. 1989) (ready-mix concrete supplier bringing antitrust suit against cement producer); *Zidell Explorations, Inc. v. Conval Int'l Ltd.*, 719 F.2d 1465 (9th Cir. 1983) (distributor of valves bringing antitrust action against suppliers). Other entities, though more remote, may nevertheless stand in such a relationship to the plaintiff that they are deemed to be operating in the same market. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (antitrust suite by manufacturer against private standard-setting organization); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (antitrust class action by title insurance consumers against insurers for participation in state-licensed rating bureaus). When the union combines with such an entity, it loses the protections of the antitrust exemption.[5]

[5] There appears to be at least one exception to this general rule. In some cases, a party that would otherwise meet the definition of a "non-labor group" was considered a "labor group" because of an "economic interrelationship" between that party and the union. *See, e.g., Jacksonville Bulk Terminals*, 457 U.S. at 721 (status as "labor group" depends on "whether there is 'some…economic interrelationship affecting legitimate union interests'"); *Carrol*, 391 U.S. at 106 ("labor group"

BE&K took discovery on this issue and, although the initial order seemed to restrict discovery to BE&K's competitors, ER 283 at 14, the court subsequently explained that it did not mean to "cut off any discovery reasonably designed to identify contractors, manufacturers or other commercial entities with whom the defendants may have formed illegal combinations." IBEW SER 304 at 3. This was sufficiently broad to allow BE&K to identify anyone falling under the definition of non-labor group as explicated above, but BE&K has been able to point to no such entity. We therefore agree with the district court that BE&K has failed to raise a material issue of fact as whether the unions combined with nonlabor groups, and therefore did not carry its burden under this prong of the *Hutcheson* test.

The district court didn't allow BE&K discovery on the alternate prong of *Hutcheson* because it took the view that failure as to one prong was fatal to BE&K's case. In its most recent pronouncement on the subject, however, the Supreme Court clearly held that a union that combines only with other labor groups may nonetheless lose the statutory exemption under the second prong of *Hutcheson*. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704 [107 LRRM 2394] (1981), involved a challenge under the Sherman Act to certain rules of the Actors' Equity Union, including the exaction of a franchising fee from theatrical agents licensed by the union.

The Supreme Court first inquired whether there was a combination between the union and any "non-labor groups," or persons who are not "parties to the labor dispute." *Id.* at 717. The Court found that the theatrical agents were not a "nonlabor group" for purposes of the statutory exemption.

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characterized by "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members" and the purported "labor group"); *accord H.A. Artists*, 451 U.S. at 718.

Id. Had this been sufficient to establish the union's entitlement to the labor exemption, the Court could have stopped right there. Instead, it proceeded to evaluate whether the union's activities were undertaken in pursuit of its legitimate self-interest. While it found the union's activity generally exempt because the regulations were "clearly designed to promote the union's legitimate self-interest," *id.*, at 721, it found "the fees that [the union] levie[d] upon the agents" might not be a "permissible component of the exempt regulatory system," *id.* at 722. Because no evidence had been presented at trial "to show that the costs justified the fees actually levied," *id.* at 712, the case was remanded for further factfinding.

Had the Court in *H.A. Artists* eventually approved all aspects of the arrangement between the union and the agents, its examination of the fee structure might have been explainable on a belt-and-suspenders rationale. But the court found fault with the fee structure—or at least found that there might be fault. Since *H.A. Artists* was an antitrust case, the only possible fault could be a violation of the antitrust laws. We read this as a clear holding that a union may violate the antitrust laws in other words, that it may lose the benefit of the labor exemption—even when it does not combine with a non-labor group. Although, prior to *H.A. Artists,* there was some doubt on this point,[6] there no longer is. *See* Daralyn J.

[6] Some cases had suggested that the union must combine with a non-labor group as a predicate for antitrust liability. In *Allen Bradley*, 325 U.S. at 810, the Court explained that whether union activities violated the Sherman Act was "dependent upon whether the union acts alone or in combination with business groups." *See, e.g., Hunt v. Crumboch*, 325 U.S. 821 [16 LRRM 808] (1945) (unilateral actions of union to drive petitioner out of business are immune from Sherman Act liability); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896, 903-04 [87 (LRRM 3041] (5th Cir. 1974) ("A Union can, without forfeiting the exemption...act with a purpose to injure or even eliminate the business of an employer...What makes the exemption disappear is sufficient proof of a *concerted* purpose, between the union and a favored employer.") (emphasis in original); *Bodine Produce*, 494 F.2d at 550

Durie and Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 Cal. L. Rev. 757, 783 & n.155 91992).

What, then, does it mean for a union to pursue an illegitimate purpose? In the broadest sense, everything a union does serves its self-interest. But *Hutcheson* requires that it act in pursuit of its legitimate self-interest. Whether the interest in question is *legitimate* depends on whether the ends to be achieved are among the traditional objectives of labor organizations. Thus, if a union forces employers to funnel money into a commercial enterprise from which the union derives profits; or if it forces the employer to hire the union president's spouse; or if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest. In such cases, the unions "cease to act as labor groups." *Jacksonville Bulk Terminals,* 457 U.S. at 714.

Of course, the *means* employed by the union bear on the degree of scrutiny we will case on the legitimacy of the union's interest. *See Local No. 189, Amalgamated Meat*

("Following *Hutcheson*, the issue became primarily one of whether there existed an improper combination with nonlabor groups.").

Other cases had suggested that illegitimate purpose alone might bring a union outside the statutory exemption. *See, e.g., Jacksonville Bulk Terminals* 457 U.S. at 714 ("the protections of [the statutory labor exemption] do not extend to labor organizations when they cease to act as labor groups or when they enter into illegal combinations with non-labor groups in restraint of trade") (emphasis added); "*Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 & n.12 [106 LRRM 2659] (1st Cir. 1981) (although ILA didn't conspire with any non-union group, its boycott of Soviet cargo was not immunized by statutory exemption because it didn't relate to "legitimate union interest"), *aff'd*, 456 U.S. 212 [110 LRRM 2808] (1982); *Bodine*, 494 F.2d at 553 (activities of non-labor group combination remain within statutory exemption because union was pursuing own interests).

Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676, 689-90 [59 LRRM 2376] (1965) (plurality opinion) (restraints on the product market must be "so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act"). Thus, where a union engages in activities normally associated with labor disputes, *see, e.g.*, 29 U.S.C. §104,[7] these will be presumed to be in pursuit of the union's legitimate interest absent a very strong showing to the contrary. *See, e.g., Bodine Produce*, 494 F.2d at 557 (group boycott and demands for recognition were "intimately related to wages, hours, and working conditions which…places it within the protection of national labor policy and exempt from the Sherman Act"). Where the union's activities are farther afield, the scrutiny is more searching. *See, e.g., H.A. Artists*, 451 U.S. at 722 (examining whether franchise fees are sufficiently related to legitimate union ends); *Carroll*, 391 U.S. at 112 ("the price-list requirement is brought within the labor exemption under the finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader").

H.A. Artists casts a highly instructive light on this issue. The activity there-collection of franchise fees from the agents for the direct benefit of union members - was not a traditional union activity; it looked like the union may have been using its bargaining power with theatrical agents to generate a

[7] Congress has provided special protection for certain traditional union activities in 29 U.S.C. §104, which, *inter alia*, prohibits restraining orders or injunctions where persons involved in a labor dispute engage in work stoppage, publicize the existence or facts of their dispute, assemble or organize to promote their interest in the dispute, advise or notify persons of their intent to do any of these acts, or advise, urge, cause or induce without fraud or violence any of these acts.

collateral source of revenue. The Court did not say the franchise fees violated the antitrust laws per se, but placed a substantial burden on the union to prove why this method of collecting revenues was not merely convenient but necessary. "[W]ithout the fees…," the Court reasoned, "the dues of [the union's] members would perhaps have to be increased to offset the loss of a general revenue source," but there was "no reason to believe that any of its legitimate interests would be affected." 451 U.S. at 722. The Court's concern thus seemed to be that the union may have funneled the market power granted to it by labor laws into a money-making enterprise. That the money would then be used to finance labor-related activities was not, in the Court's view, exculpatory, unless the union could show it could not achieve those objectives some other way.

Many of the activities of which BE&K complains are traditional organizational activities, closely related to traditional union ends. For example, the unions allegedly "picketed and handbilled the plaintiffs' premises" after BE&K refused to "recognize them as the exclusive collective bargaining representative for the employees of BE&K and its sub contractors, and enter into a collective bargaining agreement with the defendants…" SAC ¶¶31(e)(i), (iii). And the unions encouraged work stoppages by unionized employees because of well-founded safety concerns at the project site. *See* Contra Costa SER 3-5, 316-40; 348-52.[8]

That these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of BE&K does not matter. *See Pennington*, 381 U.S. at 666 ("a consequence of [legitimate] union activity may be to eliminate competition

[8] BE&K also vaguely alleged that there were violent pickets. But violence alone is not sufficient to turn protected conduct like labor picketing into an antitrust violation. *See Apex Hosiery Co. v. Leader* 310 U.S. 489, 513 (6 LRRM 647) (1940); *Bodine Produce*, 494 F.2d at 559.

based on differences in [labor] standards"); *Bodine Produce*, 494 F.2d at 549 (unions' purpose is "to eliminate competition based on differences in labor standards"). Encouraging the use of unionized labor is an objective well within the legitimate interests of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong presumption that the unions are protected from antitrust liability by the statutory labor exemption.

More troublesome are certain other activities allegedly undertaken by the unions, such as pressing frivolous lawsuits, automatically protesting against permits sought by BE&K, pressing for the passage of a regulatory measure and then agitating for its enforcement against BE&K - all allegedly to make an example of BE&K and discourage use of merit shop contractors by parties such as UPI. Taking a cue from *H.A. Artists,* we cannot say that pursuing legitimate labor goals through this kind of activity is per se exempted from the antitrust laws. *See* Durie & Lemley, 80 Cal. L. Rev. at 759-62 (using BE&K as case study). The question here, as in *H.A. Artists*, is whether the non-traditional means were appropriate-in other words, whether the non-traditional means were not only lawful, but necessary because the goals could not be achieved through traditional tactics. And the burden to show this lies with the unions. *See H.A. Artists*, 451 U.S. at 722.

Because the district court erroneously construed *Hutcheson's* two-part test in the conjunctive, it did not allow discovery. In this, we conclude, the district court erred. Plaintiff was entitled to try to raise a triable issue of fact on this point by gathering evidence in support of its allegations.

III

That's not the end of the matter, however, because the unions raise another defense. The *Noerr-Pennington* doctrine provides broad antitrust protection for those who "petition the

government for a redress of grievances." *City of Columbia v. Omni Outdoor Advertising, Inc.* [499 U.S. 365], 111 S.Ct 1344, 1953 (1991) (quoting First Amendment). This protection extends to lobbying of government officials, *Noerr Motor Freight, Inc.*, 365 U.S. at 144, and petitioning of administrative agencies and courts, *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972). In those contexts, immunity from antitrust is lost only if a party engages in "sham" petitioning.

BE&K argues that the unions engaged in a pattern of "automatic petitioning of governmental bodies… without regard to and regardless of the merits of said petitions." SAC ¶27; *see also id.* at ¶32(a) (alleging that unions filed "a series of overlapping, repetitive and sham lawsuits against plaintiffs, their employees and attorneys… *with or without probable cause and regardless of the merits* of the claims asserted therein") (emphasis added); *id.* at ¶30(a) (describing published article by the Business Manager of the Contra Costa Building Trades Council describing a computer system through which "all permits for known nonunion contractor would automatically be protested, regardless of size or amount of permit"). BE&K relies on *California Motor Transport Co. v. Trucking Unlimited*, where the Supreme Court held the allegations "that petitioners 'instituted the proceedings and actions…with or without probable cause, and regardless of the merits of the cases,'" 404 U.S. at 512, where "[o]n their face…within the 'sham' exception," *id.* at 516.

The unions counter that the Supreme Court's most recent pronouncement on the sham exception forecloses reliance on *California Motor Transport.* In *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 113 S. Ct. 1920, 1928 (1993), the Court set out a two-part test for sham litigation: First, the suit must be "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the baseless lawsuit must

conceal "'an attempt to interfere *directly* with the business relationships of a competitor.'" *Id.* at 1928 (quoting *Noerr*, 365 U.S. at 144) (emphasis in original). The two parts of the test operate in succession: Only if the suit is found to be objectively baseless does the court proceed to examine the litigant's subject intent. *Id.*; *Liberty Lake Investments, Inc. v. Magnuson*, 12 F.3d 155 (9th Cir. 1993). Under this two-prong test, the unions argue, BE&K must show that each individual suit the unions brought was objectively baseless-a task it abandoned by phrasing the question on appeal as follows: "Whether litigation that *is not objectively baseless* can still constitute 'sham litigation' sufficient to eliminate... *Noerr-Pennington* immunity." BE&K Opening Br. at 1 (emphasis added).

We're not persuaded that *Professional Real Estate Investors* effectively overrules *California Motor Transport*. Far from criticizing or limiting *California Motor Transport*, the *Professional Real Estate Investors* majority cited it with approval. The Court acknowledged that the cases dealt with different questions and noted that "nothing in *California Motor Transport* retreated from the[ ] principle[ ]" that "unprotected activity [must] lack objective reasonableness...regardless of intent or purpose." 113 S.Ct. at 1926-27.

We reconcile these cases by reading them as applying to different situations. *Professional Real Estate Investors* provides a strict two-step analysis to access whether a single action constitutes sham petitioning. This inquiry is essentially retrospective: If the suit turns out to have objective merit, the plaintiff can't proceed to inquire into subjective purpose, and the action is perforce not a sham. *See* 113 S.Ct. at 1928 & n.5.

California Motor Transport deals with the case where the defendant is accused of bringing a whole series of legal proceedings. Litigation is invariably costly, distracting and

time-consuming; having to defend a whole series of such proceedings can inflict a crushing burden on a business. *California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade. When dealing with a series of lawsuits, the question is not whether any one of them has merit — some may turn out to, just as a matter of chance — but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival. The inquiry in such cases is prospective: Where the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?

The allegations in BE&K's complaint track the language of *California Motor Transport* and, if proven, would be sufficient to overcome the unions' *Noerr-Pennington* defense. The record, as developed to date, however, forecloses any possibility that BE&K could substitute its claim. As noted, the fact that a small number in the series of lawsuits turn out not to be frivolous will not be fatal to a claim under *California Motor Transport*; even a broken clock is right twice a day. Here, however, fifteen of the twenty-nine lawsuits alleged by BE&K as part of the pattern of filings "without regard to the merits" have proven successful.[2] The fact that more than half of all the actions as to which we know the results turn out to have merit cannot be reconciled with the charge that the unions were filing

[2] The twenty-nine actions are listed in paragraph 32(b) of the Second Amended Complaint. BE&K lists separately seven suits in federal court and eight arbitration actions the unions filed against Eichleay Corporation. All were successful and ultimately enforced by the Third Circuit in *Eichleay Corp. v. International Assoc. of Bridge, Structural and Ornamental Iron Workers*, 944 F.2d 1047 [137 LRRM 2781] (1991).

lawsuits and other actions willy-nilly without regard to success. Given that the plaintiff has the burden in litigation, a batting average exceeding .500 cannot support BE&K's theory. BE&K therefore cannot sustain its burden of showing that the union's conduct falls within the sham exception to the *Noerr-Pennington* doctrine.[10]

IV

Finally, BE&K challenges the sanctions awarded against it by the district court because of its persistent reincorporation of stricken parts of the complaint in the amended complaints. The district court found that BE&K "clearly violated the Court's... Order by repleading causes of action for which summary judgment was granted for defendants." Order of 8/24/89 at 9. BE&K responds that it repleading was required by our decision in *London v. Coopers & Lybrand*, 644 F.2d 811, 814 [26 FEP Cases 755] (9th Cir. 1981), which held that "a plaintiff waives all causes of action alleged in the original complaint which are not alleged in the amended complaint." *Accord King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

BE&K's lawyers could not find no case applying this rule where the amended complaint was filed after summary judgment rather than after motion to dismiss. Nonetheless, they claim a good faith belief that they were required to replead the claims on which the court had granted summary judgment in order to preserve them for appeal.

We agree with the district court that the *London* rule only applies to amended complaints that follow upon dismissal with leave to amend, and not to those that follow

[10] Before us, the unions have moved for sanctions on the ground that BE&K's continued prosecution of this issue after the Supreme Court decided *Professional Real Estate Investors* was frivolous. We obviously disagree.

summary judgment. Nonetheless, we have found no case drawing this distinction. Counsel were not required to risk forfeiting their client's right to appeal in order to avoid sanctions. BE&K's reading of *London* is not frivolous and, in the absence of authority on point, counsel's decision to err on the side of caution cannot be faulted.

* * *

We conclude that unions can forfeit the statutory labor exemption even without combining with non-labor groups if the union acts outside this legitimate self-interest. While most of the union's activities alleged here were protected by the statutory labor exemption, the lawsuits, permit protests and lobbying activities allegedly designed to make an example of BE&K may not have been. The district court therefore erred by precluding discovery into whether these means were intimately related to legitimate union ends. Nonetheless, the error was harmless because these petitioning activities were protected from antitrust liability under the *Noerr-Pennington* doctrine. We also reverse the award of sanctions against BE&K.

AFFIRMED IN PART; REVERSED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

USS-POSCO Industries, A California general partnership, Plaintiff, and BE&K CONSTRUCTION COMPANY, A Delaware Corporation, Plaintiff-Appellant	)
vs. CONTRA COSTA COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL,AFL-CIO, a voluntary, unincorporated association; STEAMFITTERS LOCAL UNION NO. 342 of the UNITED ASSOCIATION OF JOURNEY-MEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, Defendants-Appellees.	) No: 92-15497) District Court No:) CV-87-04829

DECLARATION OF SANDRA RAE BENSON
IN SUPPORT OF MOTION
FOR EXTENSION OF TIME
WITHIN WHICH TO FILE A
PETITION FOR REHEARING AND
SUGGESTION OF REHEARING EN BANC

VICTOR J. VAN BOURG
SANDRA RAE BENSON
VAN BOURG, WEINGBERG,
ROGER & ROSENFELD
875 Battery Street, 3rd Floor
San Franciso, CA 94111
Telephone (415) 864-4000
Attorneys for Certain
Defendants-Appellee

Sandra Rae Benson, hereby declares as follows:

1. I am an attorney at law admitted to practice before this Court, and I am one of the attorneys for Defendants-Appellees, Contra Costa Building and Construction Trades Council, Piledrivers, Divers, Carpenters, Bridge, Wharf & Dock Builders Local Union No. 34, Bay Area District Council of Carpenters, Operating Engineers Local No. 3, Iron Workers Local Union No. 378, District Council of Iron Workers of the State of California and Vicinity, District Council of Operative Plasterers and Cement Masons for Northern California, Cement Masons Local Union No 825, Northern California District Council of Laborers and Boilermakers Local Union No. 549.

2. That even though the Defendants-Appellees won this case before this Court, we have some great concerns regarding certain portions of the Court's formulation of the Noerr-Pennington doctrine, which we believe are not consistence with either the Supreme Court or the Ninth Circuit's prior formulations of the Noerr-Pennington doctrine; and regarding certain portions of the Court's formulations regarding the statutory labor exemption to the anti-trust laws.

3. We have not yet decided whether we will file a Request for Rehearing and/or Suggestion of Rehearing En

Banc, and it is necessary for us to have an extension of time to file such Request for Rehearing and Suggestion of Rehearing En Banc so that we will have the time required in order to make that determination in a reasonable and orderly fashion.

4. That I represent ten different clients, as set forth in Paragraph 1 hereinabove. It is necessary for me to contact and consult with each of these ten clients prior to our being able to determine whether we should proceed with filing a Request for Rehearing and Suggestion of Rehearing En Banc. It will take some time for me to do this. Additionally, the officers of some of these organizations are not presently in the State of California, and I have to contact them in various locations.

5. That I have been unable to contact my most of my clients for purposes of consultation thus far, as I have been required to attend all day meetings of the California State Apprenticeship Council on Wednesday July 27, 1994, Thursday July 28, 1994, and today, Friday, July 29, 1994, where I am representing another group of clients. Additionally, I am scheduled to travel to Honolulu, Hawaii on Monday, Tuesday and Wednesday, August 1, 2, and 3, 1994 to attend interviews of other clients with the U.S. Attorney there regarding criminal matters currently pending in the United States District Court in which my clients were the victims of a securities fraud. Therefore, I will not be in my office in the Bay area or available to contact and confer with my clients on these matters until at least Thursday, August 4, 1994.

6. If this Court grants us additional time within which to file a Request for Rehearing and Suggestion of Rehearing En Banc, Mr. Peter Nussbaum, who represents the additional Defendants-Appellees, and I will use the time to coordinate our efforts so that we can file one joint brief in support of that Request instead of filing separate briefs.

7. I am informed and believe that Mr. Peter Nussbaum has contacted Mr. James Gilliland, Jr., the attorney for the Plaintiff-Appellant BE&K herein, and has requested his agreement to this extension of time. Mr. Gilliland stated that he would have to confer with his clients, and that since the request was made after 2 p.m. Pacific Time On July 28, 1994, and his clients are located in the Eastern Time Zone where it was then after 5 p.m., he would have to contact them today, July 29, 1994. Mr. Nussbaum expects to have a response from Mr. Gilliland sometime today.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Franciso, California this 29th day of July, 1994.

/s/
SANDRA RAE BENSON

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BE& K CONSTRUCTION COMPANY, Respondent, and STEAMFITTERS LOCAL 342, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL, Charging Parties,	32-CA-9474; 32-CA-9475; 32-CA-12531- 1-8

AFFIDAVIT

I, Richard A. Leasia, being duly sworn, hereby state:

1. I am an attorney admitted to practice before this Board and am employed by the law firm of Littler, Medelson, Fastiff & Tichy, a Professional Corporation. I have represented BE&K Construction Corporation, the Respondent in the above referenced matter, since before 1987. I represented both BE&K and USS-Posco, Inc. in connection with the case of USS-Posco, Industries v. Contra Costa County Building & Construction Trades Council, Case No. C-87-4829.

2. I am personally familiar with the motivation of the Respondent in filing and pursuing the district court complaint and subsequent appeal against the Charging Party Unions. I personally participated in each step of the filing, litigation, and appeal process on behalf of BE&K and USS-Posco.

3. The Union conduct which brought about the filing of BE&K's district court complaint and the two amended complaints is set forth at length in the complaints themselves, and more fully in the record of the district court proceedings, and will not be repeated here. Based upon this conduct, and detailed factual evidence in support of the complaint allegations which is part of the record in the district court case, it was BE&K's reasonably held belief that the Unions' conduct was unprotected by Section 7 of the National Labor Relations Act.

4. Most if not all of the Unions' activities had unlawful secondary objectives and were accompanied by acts of violence and threats. The Unions specifically sought to coerce USS-Posco, a neutral employer, to sign pre-hire, hot cargo agreements in violation of Sections 8(e) and 8(b)(4) of the Act, and to remove BE&K from the PITCAL project. USS-Posco is not an employer within the construction industry within the meaning of Sections 8(e) or 8(f).

5. At no time prior to the filing or amendment of BE&K's district court Complaint against the Unions did any of the Charging Parties ever represent employees of BE&K or USS-Posco or enter into a collective bargaining agreement with either Plaintiff. Nor did the Unions ever seek to petition the NLRB for an election by which the Unions could become the representative of BE&K's or USS-Posco's employees.

6. BE&K did not sue any employees in its challenged litigation against the Charging Parties; rather BE&K filed suit only against the Unions.

7. Plaintiffs' goals in filing the above referenced litigation, inter *alia*, were as follows: BE&K and USS-Posco sought to preserve their businesses from what they perceived to be unlawful secondary pressure tactics by the Unions. In particular, they sought relief from secondary threats, restraint and coercion designed to force USS-Posco to violate federal labor laws by ceasing doing business with BE&K, and/or by entering into a pre-hire, hot cargo agreement not sanctioned by Sections 8(e) or 8(f) of the Act. Both Plaintiffs further sought to obtain a court order establishing that union activities of the sort alleged in Respondent's complaint are subject to challenge under federal labor or antitrust laws and are not automatically exempt therefrom. Plaintiffs did not seek to retaliate against any of their employees for engaging in any concerted activity protected by Section 7 of the Act.

8. Respondent was also made aware that in October; 1987, the General Counsel issued a complaint (later settled) against one of the present Charging Party Unions, based upon some of the same conduct which became the subject of Respondent's litigation. See Cement Masons and Plasterers Union Local 825, Case No. 32-CB-2787. The General Counsel then believed that this Union's activity was not protected by Section 7 of the Act.

9. Subsequently, BE&K and USS-Posco made their decision to amend their Complaint in order to seek antitrust relief. They did so only after a searching and intensive review of the law and evidence with leading national experts in the fields of labor and antitrust law. These experts advised BE&K that, though in many respects this was a case of first impression, BE&K had viable claims against the Unions as a matter of law. Upon amending the complaint to state their antitrust theory, Plaintiffs sought treble damages because such damages are automatically awarded to prevailing plaintiffs as a matter of law.

10. Later, during the pendency of Respondent's court action against the Unions, independent authors writing in a leading Law Review reached the conclusion, agreeing with Respondent, that Plaintiffs' claims against the Unions were viable under the antitrust laws. See Durie & Lemley, The Antitrust Liability of Labor Union for Anti-Competitive Litigation, 80 Cal. L. Rev. 757 (1992). This article encouraged us to believe that an appeal to the Ninth Circuit had a reasonable basis and a strong chance of success.

11. Also while Respondent's action was pending, the Division of Advice of the General Counsel of the NLRB recommended issuance of a complaint against a union which had engaged in conduct indistinguishable from that engaged in by the Unions here. See Tame T.I.C., Case No. 27-CB-826, 827 (1993)(Attached hereto as Resp. Ex. 2). The General Counsel specifically concluded that a union's submission of negative environmental comments about a neutral employer to regulatory government agencies, and related actions, violated Section 8 (b) (4) (ii) of the Act.

12. Throughout the district court and appeals court litigation, the Unions filed numerous requests for sanctions against BE&K and USS-Posco, arguing that our litigation should be found to be frivolous or without reasonable basis. I submitted several lengthy sworn declarations to the district court (hereby incorporated by reference) asserting the objectively reasonable basis for each aspect of the Plaintiffs' claims.

13. The district court either ignored or denied each of the Unions' requests for sanctions, with one exception relating to a procedural decision on the Plaintiffs' part to replead certain dismissed allegations in accordance with Ninth Circuit precedent, in order to preserve these issues for later appeal. With that sole exception, the district court found that Plaintiffs' claims were not frivolous and that they were supported by reasonable belief in their merits.

14. Upon further review of the Unions' request for sanctions against the Respondent, the Court of Appeals rejected the Union's demand. In response to the Unions' claim that BE&K's litigation was frivolous/objectively baseless, the Court of Appeals stated: "We obviously disagree." Instead, the Court of Appeals agreed with BE&K's contention that the Unions were not entitled to any attorneys fees as a result of BE&K's litigation against the Charging Parties. USS-Posco, supra, 31 F. 3d at 811. The Court of Appeals also reversed the single instance in which the district court had awarded sanctions to the Union, finding again that the Plaintiffs had acted in good faith. (Id.).

I hereby declare under penalty of perjury under the laws of the State of California that the foregoing declaration consisting of this and _____ other pages are true and correct.

Executed this 18th day of April, 1996, at San Jose, California.

/s/
RICHARD A. LEASIA

DECLARATION OF PETER D. NUSSBAUM

I, Peter D. Nussbaum, declare as follows:

1. I am a member in good standing of the Bar of the State of California.

2. I represent Local 342 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and International Brotherhood of Electrical Workers, Local 302, in cases 32-CA-9474 and 32-CA-9475 respectively.

3. Beginning in 1987, I represented Locals 302 and 342 in litigation that was brought against them by respondent, BE&K, in the United States District Court for the Northern District of California. That litigation finally culminated in a decision by the United States Court of Appeals for the Ninth Circuit, affirming the summary dismissal by the district court of BE&K's three complaints and the award by the district court of costs to the Charging Parties as the prevailing parties in the litigation. USS-POSCO Industries v. Contra Costa Bldg. & Constr. Trades Council, 31 F.3d 800 (9th Cir. 1994) ("POSCO"). BE&K did not seek rehearing or rehearing en banc of the Ninth Circuit's decision, nor did it seek certiorari in the United States Supreme Court.

4. On October 16, 1987, shortly after BE&K filed its initial complaint in the POSCO litigation, counsel for the other Charging Parties in this case wrote to BE&K's attorney, Richard Leasia, requesting that he dismiss the complaint because it was baseless and was filed simply to harass the Charging Parties. The letter was also pointed out to Mr. Leasia that many of the actions by the Charging Parties that were challenged in the lawsuit were protected by the First Amendment and were immune from liability

pursuant to the Noerr-Pennington doctrine. A true and correct copy of a letter of October 16, 1987 from Victor J. Van Bourg to Richard Leasia, is attached hereto as Exhibit 2.

5. At approximately the same time, I called Mr. Leasia on behalf of the Charging Parties that I represented. I reiterated to him that the Noerr-Pennington doctrine immunized much of the alleged conduct challenged in his complaint. While Mr. Leasia acknowledged that he knew of no cases that supported the theory of his complaint, he refused to dismiss it. When I asked him why, he stated that the unions had come up with certain "new tactics" that had been directed against his clients and that he had been told by those clients "to find a way to stop that conduct." He also conceded that the theory of his complaint was "novel."

I also asked Mr. Leasia to explain why Locals 302 and 342 were included in BE&K's third claim for relief, which was based on certain litigation (the so-called "Piledrivers" case) in which those locals had not participated. Mr. Leasia acknowledged that he had no evidence linking either Local 302 or Local 342 to the Piledrivers case, but said that he hoped to adduce such evidence through discovery. He then rejected my request that those locals at least be dismissed from the Piledrivers claim for relief until such time as BE&K had evidence linking them to that case. Mr. Leasia did, however, promise to dismiss the locals at a subsequent time if his discovery did not disclose such evidence.

My conversation with Mr. Leasia is recounted in a declaration I filed in the POSCO litigation on March 10, 1988. A true and correct copy of that declaration is attached hereto as Exhibit 3.

6. Despite Mr. Leasia's promise, he did not dismiss Locals 302 and 342 from the Piledrivers claim for relief even after the extensive discovery he undertook produced no evidence that they had any tie to that case. The district court eventually dismissed the Piledrivers claim as to

Locals 302 and 342 on the ground that they had no relationship to that litigation.

7. While Mr. Leasia was initially lead counsel for BE&K, he did not have that role when respondent filed its second amended complaint. From that time on, I dealt only with attorneys from another law firm, and I do not recall Mr. Leasia being present or arguing to the court during any of the numerous hearings that occurred after the filing of the second amended complaint.

8. During the court of the POSCO litigation, the law firm of Gibson, Dunn & Crutcher attempted to file two amicus briefs on behalf of BE&K. The district court allowed it to file one such brief, but denied its request to file the other. A true and correct copy of the amicus brief filed by Gibson, Dunn & Crutcher is attached hereto as Exhibit 4.

9. BE&K's brief relies heavily on a student comment that appeared in the May 1992 issue of the California Law Review. The authors thank a "Steve McCracken, who provided us with access to his files." 80 Cal.L.Rev.. at 757. Mr. McCracken was a partner in Gibson, Dunn & Crutcher specializing in antitrust law. Attached hereto as Exhibit 5 is a true and correct copy of a page from the 1992 edition of the Martindale-Hubbell Law Directory listing Mr. McCracken.

10. In its brief to the Ninth Circuit, BE&K argued that "the unions had filed twenty-nine separate lawsuits." A true and correct copy of pages 2, 4, 6 and 37 of BE&K's opening brief in the Ninth Circuit is attached hereto as Exhibit 6.

11. I also represented certain respondents in Tame T.I.C., Case No. 24-CB-826, 837 (1993). In that case Advice issued a memorandum authorizing the issuance of a complaint. In fact, the case ultimately settled. Moreover,

counsel for respondents was told by Yvonne Dixon, of the General Counsel's Office, that, although advice recognized that the respondent's position might be correct, it had authorized a complaint because it believed that the case rased important issues that should be presented to the Board for resolution.

I declare under penalty of perjury that the foregoing is true and correct of my own personal knowledge, and that if called to testify in this matter I would do so as set forth above.

Executed this 17th day of May, 1996, at San Francisco, California.

/s/

Peter. D. Nussbaum

EXHIBIT 2

October 16, 1987

Richard Leasia
David Murphy
Dennis Brown
LITTLER, MENDELSON, FASTIFF
& TICHY
Sixty South Market Street
Suite 1100
San Jose, California 95113-2303

RE: USS-POSCO Industries and BE&K Construction Company v. Contra Costa County Building and Construction Trades Council, AFL-CIO, et al U.S.D.C. No: C87-4829 SAW

Gentlemen:

This letter is being written on behalf of our client Pile Drivers, Divers, Carpenters, Bridge, Whart & Dock Builders, Local 34 in response to the "courtesy copy" of the above-entitled lawsuit which you sent to our office.

Please be advised that this firm is not authorized to accept service on behalf of the Defendant and this letter does not constitute an appearance on behalf of the Defendant. This letter does, however, constitute a notification to you pursuant to Federal Rule of Çivil Procedure 11 that if you do not voluntarily dismiss the above-entitled lawsuit, and if our client is required to respond to this lawsuit, we will vigorously seek sanctions against the Plaintiffs and against

your personally pursuant to Federal Rule of Civil Procedure 11 for filing a frivolous action.

There are numerous legal and factual defects contained in your Complaint, however, we will list only a few to establish the grounds for this Rule 11 notice.

With respect to your first cause of action alleging "unlawful activities" on the basis of certain of the Defendants having urged adoption by the Contra Costa County Board of Supervisors of a toxic waste ordinance, those actions, as you are well aware, are protected by the First Amendment and the Noerr-Pennington doctrine which affords immunity to efforts by groups or individuals when lobbying political bodies because "[t]he right of petition is one of the freedoms protected by the Bill of Rights." (Eastern R. Conferences v. Noerr Motors , 365 U.S. 127, 138 (1961).

With respect to your second cause of action dealing with certain Union employees ceasing work because of hazardous working conditions, your clients are well aware of the fact that the State Department of Health in fact found that the dirt on the site was contaminated with lead and, in addition, your client's filed 8(b)(4) charges with the National Labor Relations Board concerning these incidents. You will recall that we submitted evidence to the Board and, after considering the evidence which we submitted, your clients voluntarily withdrew their charges which would have been dismissed had they not done so.

With respect to your third cause of action alleging "unlawful activities" because certain of the Defendants filed the lawsuit entitled Piledrivers, Divers, Bridge Wharf & Dock Builders Union Local 34, AFL-CIO, et al v. USS-POSCO Industries, Inc., et al., Case Number 299932, those actions are likewise protected by the Noerr-Pennington doctrine which immunity includes instituting litigation in the courts. (California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 509 (1971).

With respect to your fourth cause of action which alleges "unlawful activity" because certain of the Defendants filed grievances before NMAPC, you and your clients are ell aware that the proprietary of the Unions having filed those grievances and a requested stay of the arbitration was litigated in the United States District Court in the Western District of Pennsylvania which stay was denied by the Honorable Judge Maurice B. Cohill, Jr. Additionally, you are well aware that the arbitration panel sustained the Union's grievances.

Finally, you are well aware that litigation is currently proceeding concerning these matters in other forums including the United States District Court in the Western District of Pennsylvania.

It is our firm belief that this instant litigation is frivolous and designed solely to harass the Unions because you and your clients have been unsuccessful in other harassing litigation which you have instituted in the State Court.

Based upon the foregoing, we are placing you on notice that unless this litigation is dismissed, our clients will vigorously seek Rule 11 sanctions against your clients and against you personally.

Sincerely,

/s/

VICTOR J. VAN BOURG

VVB/CEF

EXHIBIT 3

PETER D. NUSSBAUM
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Attorneys for the Defendants
IBEW, Local 302 and
Steamfitters, Local 342

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

USS-POSCO INDUSTRIES, et al., Plaintiffs,	) CASE NO. C-87-4829 SAW
vs.	) DECLARATION OF PETER D.
CONTRA COSTA COUNTY BUILDING CONSTRUCTION TRADES COUNCIL AFL-CIO, et al., Defendants.	) NUSSBAUM IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL DISMISSAL AND/OR SUMMARY JUDGMENT

I, PETER NUSSBAUM, declare:

1. I am a member of the State Bar of California and am admitted to practice before the United States District Court for the Northern District of California.

2. After reviewing the complaint in this action I called Richard Leasia, plaintiffs' counsel. I called because it did not appear, based upon my preliminary research, that the first, third and fourth claims stated claims upon which relief could be granted. Also, I wanted to confirm that my clients were not included in the second, third and fourth claims because those claims did not appear to allege any conduct on their part.

I expressed my views to Mr. Leasia and requested that he dismiss the action as to my clients. He refused to do so although he acknowledged that he knew of no cases which directly supported the first claim. When I asked why he would not dismiss that claim in view of Noerr-Pennington, he stated that the union defendants had come up with certain new tactics that had been directed at his clients and that hie clients had instructed him to find a way to stop that conduct. He conceded that the first claim was somewhat novel.

With regard to the third claim I asked how my clients were covered since neither they nor the Building Trades was a named plaintiff. He admitted that he had no evidence that directly tied my clients to the lawsuit but stated a belief by his clients that all of the union defendants were tied to all of the various conduct. He stated that he hoped through discovery to obtain evidence to support that theory.

I suggested to Mr. Leasia that the proper way to proceed was to dismiss my clients from the third claim and, if he later obtained evidence through discovery which implicated them, to amend the complaint. I also mentioned that by including my clients in the third claim without any evidence that they were involved in the lawsuit, he had

violated Rule 11 and that I would see sanctions against him and his clients if he did not dismiss that claim as to Locals 302 and 342. (I also stated that I would seek sanctions with regard to the other claims if they were not dismissed as well.)

At no time did I ask Mr. Leasia not to conduct discovery until the Court ruled on a Rule 12 motion. In fact, I expected him to begin discovery and, for that reason, filed a motion for a protective order staying discovery until my motion for summary judgment was ruled upon. Such a motion would not have been necessary if I had already discussed a stay of discovery with Mr. Leasia.

3. In reviewing Mr. Leasia's brief I noted the following statement on pages 23-24.

> In fact, in the interests of economy, Defendants' counsel expressly asked Plaintiffs not to conduct discovery until the Court could rule on an anticipated Rule 12 motion. (Emphasis in original.)

I assumed when I first read that sentence that he was referring to counsel for one of the other defendants but, upon reviewing his declaration, realized he was referring to me even though the declaration (¶2) does not claim that I asked him to delay discovery.

4. On March 1, 1988 I called Mr. Leasia and told him that he had incorrectly stated that I had requested a delay of discovery. At first he claimed that his brief made no such statement. When I pointed out the above sentence to him he said that he had "interpreted" my comments about the cost of discovery as a request to postpone it. I pointed out that his brief said that I "expressly" asked that discovery not be conducted. He conceded that that statement was not accurate and said he would so inform the court at oral argument if I so wished. I asked him to please correct it in writing before the

hearing of the other defendants and suggested that I file a counter-declaration. I told him that I thought he should correct the error since he created it but, if he would not, I would have no choice but to file a declaration.

I declare under penalty of perjury that the above is true and correct of my own personal knowledge and that, if called upon to testify, I would do so as set forth above.

Executed this 9th day of March 1988 at San Francisco, California.

/s/ _____

PETER D. NUSSBAUM